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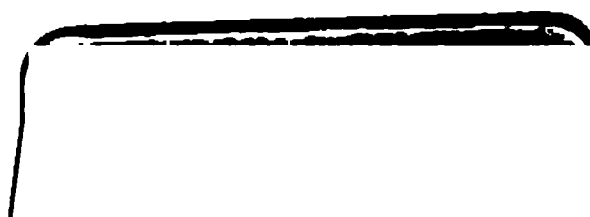
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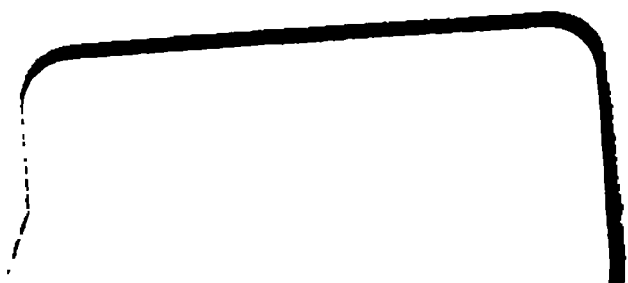
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REPORTS OF CASES

DETERMINED

AT NISI PRIUS,

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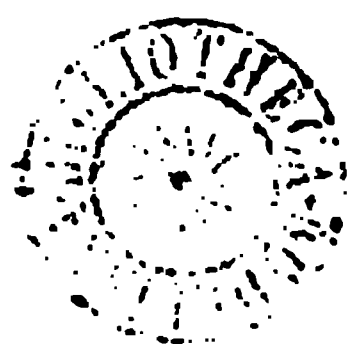
R E P O R T S
OF
CASES,
DETERMINED
AT NISI PRIUS,
IN THE COURTS OF
KING'S BENCH, COMMON PLEAS, AND EXCHEQUER,
AND ON THE
NORTHERN AND WESTERN CIRCUITS,
FROM THE
SITTINGS AFTER MICHAELMAS TERM, 1 WILL. IV. 1830,
TO THE
SITTINGS AFTER TRINITY TERM, 7 WILL. IV. 1836,
INCLUSIVE.

BY
WILLIAM MOODY Esq., OF LINCOLN'S INN,
AND FREDERIC ROBINSON Esq., OF THE INNER TEMPLE,
BARRISTERS AT LAW.

VOL. I.

LONDON:
SAUNDERS AND BENNING,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43. FLEET-STREET;
AND J. AND W. T. CLARKE,
PORTUGAL STREET.

1837.



A

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ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

MICHAELMAS TERM,

1 W. IV. 1830.

ADJOURNED SITTINGS AT WESTMINSTER.

FENDAL *v.* MARRIOTT.

1830.

WESTMINSTER,
Dec. 3.

GURNEY, who was for the plaintiff in this case, applied to put off the trial until the next sittings, on the ground of the absence of a material witness; and stated the smallness of the demand, which was 3*l.* only, as a reason for not adhering, in this case, to the rule as to the plaintiff's having the record in his own power, suggesting also that otherwise the plaintiff would probably be unable, from poverty, to pursue his remedy.

The Court will not put off a trial at the instance of the plaintiff beyond the present sittings, on account of the smallness of the claim, and the alleged poverty of the plaintiff.

Lord TENTERDEN C. J. said it was important to act on the established principle that the plaintiff's record is in his own power, and refused the application.

1830.

WESTMINSTER,
Dec. 11.

WHITEHEAD v. SCOTT.

In trover for a written document, the plaintiff may prove the nature and description of the document by secondary evidence, though the defendant offers to produce it.

A party has a right to call for and have read, a letter making a demand on the other party, for, the purpose of proving the demand, though the counsel for the other party offers to admit the demand. The statement of facts in such letter is not evidence of the facts, but only of their having been communicated to the other side.

TROVER for a deed.

The plaintiff's counsel, in proving his case, asked of a witness the description and contents of the deed without calling for it.

F. Pollock for the defendant offered to produce the deed, and contended that the plaintiff must put it in, though no notice to produce was necessary.

LORD TENTERDEN C. J. Not at all. They have a right to go on with their case: you may produce it as your evidence. It was so decided in a case before Sir *James Mansfield*.

A letter, said to be a demand of the deed, was called for by the plaintiff. *F. Pollock* for the defendant refused to produce it, but offered to admit the demand and said that the plaintiff was not entitled to put in the letter for the purpose of having his own statement of facts read, and that he had known Lord *Ellenborough* refuse to have a party's own letters read in such circumstances.

LORD TENTERDEN C. J. The plaintiff has a right to have the letter read as notice to the defendant. It will not be evidence of any statement in it, but only that the defendant was informed so. (a)

Verdict for the defendant.

Campbell and *F. Kelly* for the plaintiff.

F. Pollock and *Tomlinson* for the defendant.

(a) *Cotton v. James*, 1 M. & M. N.P.C. 273. *Fellowes v. Williamson*, i b. 306. *Vacher v. Cocks*, ib. 353.

1830.

ADJOURNED SITTINGS IN LONDON.

CLARK the Younger v. CLARK the Elder.

GUILDHALL,
Dec. 13.

ASSUMPSIT by the payee against the maker of a promissory note.

Communications made to an attorney respecting a matter in dispute and controversy are privileged, though no cause was then commenced.

The defence was that the note was obtained by fraud; and it was proposed to give in evidence, on the part of the defendant, a conversation of the plaintiff with an attorney whom he had consulted on the transaction. At the time of the conversation a dispute had arisen between the parties, but no legal proceedings were pending. The plaintiff however consulted the attorney, as his attorney, as to his rights, and put an agreement, one of the documents connected with the transaction, into his hands to get it stamped. The attorney so consulted was not the plaintiff's attorney in the cause.

F. Pollock for the plaintiff objected to the reception of the evidence. The proper rule is, that if the communication made has any connection with legal proceedings, it cannot be given in evidence. In this case it would come within even a stricter rule; for it clearly had reference to an action contemplated, if not actually commenced.

Sir *James Scarlett* and *R. V. Richards* for the defendant. Formerly any communication to a

1830.

CLARK

v.

CLARK.

legal adviser, even to a conveyancer, was excluded; but the rule has since been narrowed. The case of *Williams v. Mundie*, R. & M. N.P.C. 34., confines the privilege to communications relating to a cause or suit existing; and that case has since been acted on in the Common Pleas (*a*), and in a case in *Ireland*. (*b*) The rule so laid down is the most reasonable. Suppose a man to employ an attorney about a cause to enforce some civil right, and that in the course of their intercourse he confesses some crime committed by him, it would be absurd to protect him against the consequences of such a confession. The present case is clearly within the rule laid down in *Williams v. Mundie*. No cause was depending at the time of the communication: the witness received no instructions as to any cause: he finally, when a cause was commenced, was not the person employed to conduct it.

F. Pollock said that he had heard *Dallas C. J.* express very warmly his opinion of the necessity of extending the privilege beyond communications made with reference to a cause. (*c*) The rule cannot depend, at all events, on the fact of the attorney to whom it is made being afterwards concerned in the cause, or not; if it did, he might decline to act as attorney for the express purpose of becoming a witness, and the client might thus be betrayed. As to the case put of a party confessing a crime, the law is not as stated on the other side. If the

(*a*) *Broad v. Pitt*, 1 M. & M. N.P.C. 233.

(*b*) *Cit. ib.* (*c*) See *Cromack v. Heathcote*, 2 Bro. & B. 4.

conversation is in its nature professional, all that the client says must be taken to be, in his opinion, material to the question on which he consults his legal adviser; and, if so, it is to be protected. There may be many cases in which it would be very expedient for him to disclose circumstances in his life very remotely, or not at all, connected with the matter then in dispute. The attorney is not to determine whether the communication is material or not; yet, if the conversation is not absolutely excluded, the decision of that question must either rest with him, or the mischief must be done, and the evidence heard, in order to enable the Court to judge whether it is admissible or not.

1830.
 CLARK
 v.
 CLARK.

LORD TENTERDEN C. J. I think the rule stated in *Williams v. Mundie*, as cited in *Phillipps on Evidence*, is narrower than that which I am likely to have laid down, in this respect; I think I could not have said that it must relate to matters communicated strictly for the purpose of *bringing* an action, or to a cause actually existing. (a) I certainly have been more inclined to restrict the privilege than many other Judges; and I have been so, very much in consequence of a cause to which my attention was drawn at a very early period of my professional life (before I was at the bar), which was tried on the Midland circuit, and in which Serjt. *Adair* went specially as counsel. It was an action for bribery; and on its appearing that a witness who was called to prove conversations was the attorney

(a) See the judgment of Best C. J. in *Broad v. Pitt*, 1 M. & M. 234., where Lord Tenterden's ruling in *Williams v. Mundie* is adopted with the same qualification as in the principal case.

1830.

CLARK

v.

CLARK.

of the party, the Judge at once refused to allow the evidence to be gone into, and nonsuited the plaintiff. The nonsuit was set aside, and a new trial had, on the ground that, though the witness was the defendant's attorney, the communication was not made to him in his professional character. *Bramwell v. Lucas*, 2 B. & C. 745. proceeded on the same principle ; and accordingly, an attorney there was held to be at liberty to give evidence of enquiries made of him by his client, as to a mere matter of fact, for that his professional character was not there concerned. Suppose a party to consult his attorney whether or no he should bring or resist an action ; I cannot doubt that such a communication would be privileged, though no suit was pending at the time. In the present case no suit was pending at the time ; but after dispute had arisen, the plaintiff consulted his attorney on the subject, put documents into his hands, and steps were taken on them to render them effectual. I think that was a communication made to the attorney in his professional character, with respect to a matter then in dispute and controversy, although no cause was in existence with respect to it : and I think that such a communication is privileged.

The evidence was rejected.

Verdict for the plaintiff.

F. Pollock and *Justice* for the plaintiff.

Sir J. Scarlett and *R. V. Richards* for the defendant.

REX v. ABRAHAM.

GUILDHALL,
Dec. 14.

INDICTMENT for perjury.

The indictment stated that issue was joined in a cause of *Jacob v. Abraham*, and the cause set down for trial, and appointed for a particular day; and that the defendant in that cause, before that day, made an affidavit before Lord *Tenterden* C. J., in which he stated that he had a good defence to the action, which he would be able to prove at the trial, and that some of the bills on which it was brought were void for usury; and it then assigned perjury on these allegations.

Counsel are not allowed to argue at length at Nisi Prius the invalidity of an indictment, for the purpose of inducing the Court to refuse to try it.

Before the case was opened on the part of the prosecution, *Talfourd* for the defendant suggested that the indictment was clearly bad, and that the Court therefore would interfere to stop the trial. The only manner in which such an affidavit as that stated in the indictment could be a judicial proceeding, or the matters contained in it become material, would be upon an application to postpone the trial of the cause; but the indictment does not shew that any such application was made or intended. The defect in *R. v. Tremearne*, R. & M. N. P. C. 147., was very much of the same nature; and there the Court interfered in the mode suggested.

Lord TENTERDEN C. J. It may be convenient sometimes for counsel to suggest a point on which

1890.
 REX
 v.
 ABRAHAM.

an indictment is clearly bad, to save the time of the Court; but it is not usual to argue such matters at length here, for this is not the time or place to discuss such disputed questions. In the present case, it seems to me that the occasion on which the affidavit was intended to be used may be sufficiently collected from the indictment: at all events, I shall not stop the trial. If there is any weight in the objection, the defendant, if he is convicted, will have the benefit of it hereafter.

Verdict for the crown.

In the ensuing term the defendant did not appear when called on to receive judgment, and his recognizances were estreated.

C. F. Williams and *Platt* for the prosecution.

Talfourd and *Steer* for the defendant.

In *R. v. Tremearne*, cited *supra*, and *R. v. Hepper*, R. & M. N. P. C. 210., the objections to the form of the indictment, on which the presiding Judges refused to try the cases, were not suggested by counsel, but pointed out by the Court.

GUILDHALL,
 Dec. 16.

SHOTT and Another v. STREALFIELD and GREEN.

Where one of the defendants in a cause informed a third person of the partnership of the defendants, reports of such information by that person are admissible in evidence, though not made to the plaintiff, or in the presence of a defendant.

ASSUMPSIT on a bill of exchange accepted in the name of *Strealfield* and Co., and for goods sold and delivered.

The plaintiffs were maltsters, and had sold malt to *Strealfield* and Co.; and the question in the cause was, whether the defendants were partners at the time when the goods were sold, and the bill given for them.

1830.
 SHOTT and
 ANOTHER
 v.
 STREALFIELD
 and ANOTHER.

Strealfield and *Johnson* had carried on business as maltsters. *Johnson* went out of partnership, and introduced *Green* to a witness as his successor in the partnership with *Strealfield*, and told the witness, in *Green's* presence, that *Strealfield* and *Green* were to carry on the business together from the time of the conversation. The witness was asked whether, after this conversation with *Johnson* and *Green*, he reported that *Strealfield* and *Green* were partners.

Campbell objected that this was not evidence, unless it was shewn the defendants, or one of them, were present when it was reported.

LORD TENTERDEN C. J. I think it is; because otherwise it will be said presently that what was said was confined to the witness, and the plaintiffs could not have acted on it.

Verdict for the plaintiffs.

Sir *J. Scarlett* and *Miller* for the plaintiffs.

Campbell and *F. Kelly* for the defendants.

1830.

GUILDHALL,
Dec. 21.

EVANS and Another v. TRUEMAN and Others.

A party receiving East India warrants from a factor in pledge for monies advanced to him, cannot retain them, under 6 G. 4. c. 94., against the true owner, if from the circumstances he must, as a reasonable man, have known them not to belong to the factor; although no direct communication of that fact is made to him.

TROVER for forty chests of indigo.

The plaintiffs purchased the indigo in question of *Nevitt* and Co. While the warrants continued in the possession of *Nevitt* and Co., *J. Nevitt*, a partner in that house, pledged them with the defendants, who afterwards obtained the indigo under them. The contract under which the defendants obtained them was not put in evidence by either party, each party requiring it to be put in by the other; and there was some doubt as to the proof of the consideration given. These points however were reserved for the consideration of the Court; and the only question discussed at the trial was, whether the defendants, assuming that they had given the necessary consideration for the warrants, were entitled to the protection of the stat. 6 G. 4. c. 94. s. 2.

Nevitt and Co. were brokers at *Liverpool*, and *J. Nevitt* resided principally in *London*, and dealt largely in indigo, both as broker and on his own account. There was some evidence tending each way, on the question whether the defendants had reason to believe that *Nevitt* held the warrants only as a broker.

Sir *James Scarlett* for the defendants. Since the stat. 6 G. 4. c. 94. s. 2., any person holding bills of lading, *India* warrants, or other documents passing

by delivery, is to be considered the true owner of them, so as to be able to pledge them for money or negotiable securities, unless the pledgee has actual notice that the pledger is not the true owner. If the pledgee indeed knows that the pledger generally carries on business as a broker only, that may be notice to him that he is only a broker in the particular transaction: but that is not the case here. Even in *London*, where a broker enters into a bond and takes an oath not to trade on his own account, the same parties frequently act both as merchants and brokers. But *Nevitt* and Co. were in business at *Liverpool*, where no such distinction is even required; and in fact it is proved that *J. Nevitt* did act extensively in each capacity. The defendants therefore would not know that he was only a broker in this particular case, independently of any peculiar facts connected with it: and the evidence given for the purpose of proving that they had that knowledge, fails to shew that fact, and does not even prove that they had, at the time of the transaction, reasonable ground for suspecting that he acted as broker only. But, if that be otherwise, a party is not to be bound by having reason to suspect; the law will not leave the rights of men dependent on any thing so vague, or allow a jury to look conjecturally into the minds of men on questions where different individuals will act differently under the same circumstances. If reason to suspect were to exclude a party from the benefit of these provisions, the legislature might so have stated it in the clause: but the statute requires actual knowledge, a determinate thing which admits of

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proof, and must be taken to exclude such vague enquiries and conjectures.

Lord TENTERDEN C. J. The expression of the statute is, that a party is to be entitled to its protection, if “he shall not *have notice*, by the documents or otherwise,” that the pledger was not the actual and bonâ fide owner of the goods pledged. A person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge, acquired in either of these ways, is enough, I think, to exclude a party from the benefit of the provisions of this statute: slight suspicion, I think, will not. The question I shall leave to the jury in this case, where there is no evidence of direct communication, is, whether the circumstances were such, that a reasonable man, and a man of business, applying his understanding to them, would *know* that the goods were not *Nevitt’s*. If so, the defendants are not entitled to retain them.

Verdict for the defendants.

In *Hilary* term, *F. Pollock* moved to enter a verdict for the plaintiffs on the points reserved in the cause, or else to have a new trial, on the ground that the verdict was against evidence on the question left to the jury; but no objection was made as to the manner in which that question was presented to them. The Court granted a rule

nisi on the former ground, but refused it on the latter.

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F. Pollock, Evans, and Wightman for the plaintiffs.

Sir *J. Scarlett, Campbell, and Coleridge* for the defendants.

NICHOLLS *v.* DOWNES.

GUILDHALL,
Dec. 24.

DEBT for goods sold and delivered, and the money counts.

The plaintiff proved his case by evidence of an admission of the debt by the defendant.

Campbell for the defendant, in answer stated that he could shew that after the admission proved, the plaintiff, being in prison, petitioned under the Insolvent Act, and gave in his schedule, in which he made no mention of his demand on the defendant; and therefore he could not now come into Court and say the defendant was a debtor at that time.

A party, who has given in a schedule on oath of all his debts and credits to the Insolvent Debtors' Court, cannot afterwards claim a debt not there stated.

Quære, Whether copies of the proceedings in the Insolvent Debtors' Court are admissible under 7 G. 4. c. 57. s. 76. except for the insolvent and creditors.

Lord TENTERDEN C. J. called on *F. Pollock* for the plaintiff. Can it be allowed that a party shall be admitted to claim, in a court of justice, a debt, after having on oath declared there was none such?

F. Pollock said he recollected a similar case, in which Lord *Ellenborough* had said, that the defend-

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ant's having cheated his assignees, was no reason why another person should cheat him.

Lord TENTERDEN C. J. I cannot assent to that.

Campbell offered a certified copy of the schedule under the seal of the Insolvent Debtors' Court.

On this being objected to, Lord TENTERDEN, after referring to the act, said, I have considerable doubt under the seventy-sixth section whether a third person can take advantage of the provision. It seems to me, that it may be confined to creditors and to the insolvent, who have a right to copies; but my doubt is, whether a stranger can take advantage of it. However, I will receive it; as, where there is a doubt, my inclination is to receive evidence.

It was however not put in; proof of the plaintiff's admission at the time of the schedule, that he was debtor to the defendant, being given, and thereupon *F. Pollock* consented to be

Nonsuited.

F. Pollock and *Godson* for the plaintiff.

Campbell for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

MICHAELMAS TERM,

1 W. IV. 1830.

ADJOURNED SITTINGS AT WESTMINSTER.

HANWAY *v.* BOULTBEE and Ux.

1830.

WESTMINSTER,
Nov. 30.

TRESPASS for false imprisonment, and for taking the plaintiff's goods.

The defendant pleaded, first, not guilty; and, secondly, to the count for false imprisonment, that the plaintiff wilfully committed damage to certain personal property of the defendant *Boultee*, to wit, a dog, to wit, at, &c. and was then and there beating the said dog, and (after negating the exceptions in the 7 & 8 G. 4. c. 30. s. 24.) that the plaintiff being found so doing, the other defendant (the wife) had the plaintiff apprehended

A party using unreasonable violence to beat off a dog which runs at him, is guilty of a wilful trespass under the statute 7 & 8 G. 4. c. 30. s. 24.

And if he is seen committing the act, and a constable immediately sent for, who follows him (he

having quitted the place), and apprehends him at the distance of a mile, this is an "immediate apprehension" of a person "found committing" an offence under the 7 & 8 G. 4. c. 30. s. 28.

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and taken before a justice of the peace. Repliation, *de injuria*, &c.

The circumstances of the case as far as related to the imprisonment were, that the plaintiff, being a pedlar, went into the yard of the defendant with his pack to sell goods; that a small dog of the defendant's ran out barking towards him; that the plaintiff struck the dog a violent blow, which stunned him at the time, and made him permanently blind; that Mrs. *Boulton*, the second defendant, being on the spot at the time, sent for a constable, who came immediately and followed the plaintiff, who had gone away, found him at a public house about a mile off, and took him before a magistrate, which was the imprisonment complained of. The magistrate advised the plaintiff to make some compensation for the injury to the dog, but discharged him out of custody.

Wilde Serjt. for the defendants said, that on these circumstances the defendants must have a verdict as to the imprisonment. The stat. 7 & 8 G. 4. c. 30. s. 24. gives the magistrates the power of awarding compensation in cases of wilful or malicious injury to property, and section 28. authorizes the immediate apprehension, without a warrant, of persons found committing any offence against the act. The plaintiff here had committed wilful damage to the defendant's dog. If he had any occasion to use the violence which he did towards it, he ought to have replied specially that the dog attacked him, and that he necessarily beat him in his own defence; he has not done so, and having only put the plea in issue, he must fail, for

the plea is proved. Even if he had so replied, he would fail, because he must then have proved the necessity of his beating the dog as he did; and the facts do not shew it, for he made no attempt to drive the dog away: and, at all events, he can be no better off on the general form of replication which he has adopted. Assuming then that the injury was wilful, the apprehension was justified under section 28.: for the injury need not be malicious; the words “wilfully or maliciously” are in the disjunctive, and malice against the owner is expressly made unnecessary by section 25. It may be said that the apprehension is not authorized, because section 28. speaks only of persons “found committing any offence,” and that the law therefore is now different from what it was under the 1 G. 4. c. 56. s. 3., which authorized the apprehension, without warrant, of any persons “who shall have actually committed, or be in the act of committing, any offence” against that act. The words are certainly different; but those used in the present statute must receive a reasonable construction: it cannot be meant that the party must be in the very act of committing the offence; that he must be taken in such a case as the present, while his stick is on the dog, or in breaking a fence, while his hand is upon the palings: it can only mean that the apprehension must be immediately connected with and consequent upon the act done; that the party is not to take him without a warrant upon a long past offence.

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TINDAL C. J. The question arising upon these facts is sufficiently raised upon these pleadings for

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me to leave it to the jury, and they will have to consider, first, whether the plaintiff had committed a wilful injury to the dog; and, secondly, whether he was found committing that offence and immediately apprehended. With respect to the first question, I think that the plaintiff must be considered as having wilfully injured the dog, if the violence which he used clearly exceeded all which was necessary for his own protection: if it was *reasonably* done in his own defence, it was not a wilful injury; if it exceeded all due bounds, it was. With respect to the second question, the words of the 7 & 8 G. 4. certainly differ materially from those in the 1 G. 4., and were obviously meant to restrict the powers given by that act. The object of the legislature seems to have been to allow the immediate apprehension of a party taken in the commission of a crime of this nature, because otherwise such offences would frequently be committed by persons passing through or having no fixed domicile in the place, and they would therefore entirely escape, if the party injured were obliged to wait for the formalities of a charge before a magistrate, or a warrant. Where the offender is fixed in the country, so that he can be found and apprehended at a subsequent time, there is no reason why that apprehension should not be after a regular proceeding; and the statute therefore differs from 1 G. 4. c. 56. (a), and does not allow a stale apprehension on an old charge, without a warrant. Still the words of the present statute must not be taken so strictly as to defeat its rea-

(a) Repealed by 7 & 8 G. 4. c. 27.

sonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit to be made: I think that would be sufficient. So, in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case, I think it must be treated as an "immediate apprehension" for an offence which the plaintiff, supposing under the circumstances that it was an offence at all, was "found committing." (a)

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Verdict for the plaintiff.

Taddy Serjt. and *Tomlinson* for the plaintiff.

Wilde Serjt. for the defendants.

(a) *R. v. Howarth*, R. & M. C. C. R. 207.

1830.

 ADJOURNED SITTINGS IN LONDON.

 GUILDHALL,
 Dec. 15.

PAIN v. BEESTON and Another.

It is not admissible to impeach a witness by shewing he has made a particular statement, unless the witness denies having made such statement. It is not enough that he states he has no recollection of making such statement.

ASSUMPSIT.

A witness for the defendants had been asked in cross-examination whether he had not, on a particular occasion, made a certain declaration, and had answered that he had no recollection of any such conversation one way or the other, without expressly denying the declaration.

Bompas Serjt. called a person in contradiction, to prove that the witness had made the declaration in his hearing; and, on objection being made, argued that the importance of the subject was such that the first witness could not have made the declaration without recollecting it.

TINDAL C. J. said, he had never heard such evidence admitted in contradiction, except where the witness had expressly denied the declaration; and he refused the evidence.

Verdict for the plaintiff.

Bompas Serjt. and *Rising* for the plaintiff.

Andrews Serjt. and *Carrington* for the defendants,

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS IN AND AFTER

HILARY TERM,

1 W. IV. 1831.

FIRST SITTINGS IN TERM AT WESTMINSTER.

VERTUE *v.* BEASLEY and Others.

1831.

WESTMINSTER,
Jan. 12.

TRESPASS for breaking and entering the plaintiff's house, &c. and taking his goods; with a count *de bonis asportatis*.

The plaintiff was tenant to the defendant *Beasley*, and rent being in arrear, the landlord distrained. After the distress, but before the goods were impounded or removed, the plaintiff tendered the rent due, with the costs of the distress. *Beasley* however refused to receive it, and he and the other defendants removed the goods. This removal was the trespass complained of.

A tenant, tendering his rent after distress taken, but before it is impounded or removed, may maintain *trespass* for a subsequent removal of the distress.

Williams and *Comyn*, for the defendants, contended that the removal, under the circumstances,

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was a mere irregularity in the mode of conducting the distress, and properly the subject of an action upon the case, not an action of trespass; the goods having come lawfully into the possession of the defendant, by a distress proper at the time when it was made.

Whitcombe for the plaintiff. The statute 11 G.2. c. 19. s. 19. expressly gives a remedy by action either of trespass or on the case, at the election of the plaintiff; and accordingly, in *Etherton v. Popplewell*, 1 East, 139. trespass was held maintainable. (a)

PARKE J. The statute gives the option; and, although it has been held that the party must pursue the remedy proper under the circumstances, I think trespass is maintainable here, for the injury is a wrongful taking away. If the injury had arisen from a mere neglect to do some act, case would have been the only proper remedy.

A juror was afterwards withdrawn.

Whitcombe for the plaintiffs.

J. Williams and Comyn for the defendants.

(a) See also *Winterbourne v. Morgan*, 11 East, 395.

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EFFORD v. BURGESS.

WESTMINSTER,
Jan. 13.*ASSUMPSIT* for use and occupation.

The action was brought for a sum of 20*l.*, being two quarters' rent. As to one quarter, the defence was, that the rent had been levied by distress: and it appeared that the goods had been seized under a distress, and sold for the sum of 1*l.* 11*s.*; and that the expenses of the distress were 10*s.*; so that the plaintiff admitted himself satisfied to the extent of 1*l.* 1*s.* and no more. The defendant tendered evidence to shew that the value of the goods seized was 9*l.* or 10*l.*

In an action for rent, *semble* that it is no answer that the landlord has distrained goods for it to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a price, the tenant's remedy is by action.

Campbell for the plaintiff objected to the receipt of this evidence. The plaintiff is only satisfied to the extent of the sum actually produced by the sale. If the sale were improperly conducted, so that too small a sum was realized, the defendant will have a remedy, but it must be by a separate action.

PARKE J. however admitted the evidence, saying that he had recently reserved the same point for the opinion of the Court; but that no motion had been made upon it. In summing up to the jury, his Lordship said that his own impression was, that the defendant's remedy was only by a cross action, if the sale were improperly conducted; but at the time of the former case he had spoken to some of the Judges about it, who concurred

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with him in thinking it a question of some doubt: he would therefore leave it to the jury to say what the goods would have been worth, if reasonable pains had been taken to sell them; and allow the plaintiff, if the jury should be of opinion that the goods were worth more than the sum obtained for them, and should therefore reduce his claim, to move to increase the damages.

The jury however thought that the full value had been obtained, and found a verdict for the plaintiff for 18*l.* 19*s.*, with leave to the defendant to move to reduce it to 8*l.* 19*s.*, on a question as to his liability under the agreement to pay rent at all for the other quarter.

Campbell and *Platt* for the plaintiff.

Archbold for the defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

WESTMINSTER,
Feb. 1.

REX v. The Inhabitants of EDMONTON.

The inhabit-
ants of a pa-
rish are not
bound to the
repair of a
way used by
the public and

THIS was an indictment for the non-repair of a highway “over *Edmonton* allotment of *Enfield Chase*, &c.” Plea, not guilty.

The road in question passed over a part of the parish for more than twenty years, if there be no owner who could dedicate the way to the public, and the repairs by the parish be shewn to have been begun and continued under a mistaken notion of the liability of the inhabitants to repair.

The inhabitants are bound by such repairs, if made with full knowledge of the facts, and with the intention of taking upon themselves the public duty.


Semble that roads set out under an enclosure act do not by presumption of law belong to the adjoining owners.

parish of *Edmonton*, which formerly had been part of *Enfield Chase*.

In the 17 G. 3. an act of parliament was passed, intituled “An act for dividing the Chase of *Enfield*, in the county of *Middlesex*, and for other purposes therein mentioned,” in which it was recited, that the King’s most excellent Majesty was seised to himself and his heirs and successors in fee simple of the Chase of *Enfield*, in the county of *Middlesex*, being part of the estates and possessions of the duchy of *Lancaster*, subject nevertheless to such right of common and other rights as the freeholders and copyholders of messuages, lands, and tenements situate and being within the several parishes of *Enfield*, *Edmonton*, *South Mims*, and *Monken Hadley*, in the county of *Middlesex*, or the tenants or occupiers thereof for the time being, were entitled to within and upon the said Chase.

The act provided for the allotments to be made to the different persons and parishes interested, in lieu of the rights extinguished, and enacted that the *Edmonton* allotment “should from thenceforth be and remain vested in the churchwardens of the parish of *Edmonton* for the time being, and their successors for ever, in trust for, and for the benefit of the owners and proprietors of freehold messuages, lands, and tenements within the said parish of *Edmonton*, their heirs and assigns, and their lessees, tenants, and under-tenants for the time being, entitled to a right of common and other rights within the said Chase, according to their several estates and interests therein.”

This act extinguished all former rights, and directed that after the 1st of *January* 1779 *Enfield Chase* should be dischased.

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No division of this allotment took place until the year 1800, when an act of parliament was passed for inclosing the commons and wastes in the parish of *Edmonton*. This act, after reciting the former act, and that *Edmonton* allotment therein described “was vested in the churchwardens of *Edmonton* for the time being, in trust for the freeholders and copyholders of the said parish having right of common within the said Chase,” directed that the commissioners should appoint and stake out all such public carriage roads and by-ways, forty feet wide at the least, &c., over the lands and grounds thereby intended to be divided and inclosed, as they should judge necessary; and after providing for the making and fencing the said roads, directed that “the said roads should, from time to time, be supported and kept in repair in the same manner as other public roads within the said parish were by law to be amended and kept in repair.” And that the said commissioners should, and they were thereby empowered and required to “set out and appoint, and cause to be made and completed, such public bridle roads and foot ways, and private carriage roads and ways; and also such banks, ditches, drains, water-courses, bridges, stiles, and other conveniences, in, over, and upon the lands and grounds thereby intended to be divided and inclosed, as they should think requisite; and the same should be made and erected, and at all times thereafter repaired, cleansed, maintained, and kept in repair, by such persons and in such manner as the said commissioners should appoint; and that after the several public and private carriage roads and ways should have been set out and made as

thereinbefore mentioned, it should not be lawful for any person or persons to use any other roads or ways, either public or private, over or upon the said lands and grounds; and that all former roads and ways which should not be set out and appointed as the roads and ways through or over the said lands and grounds, should be deemed part of the lands and grounds thereby intended to be inclosed."

In order to enforce the repair of private roads, it was by another clause enacted, "that in case any person or persons should neglect or refuse to make or duly repair, amend, support, cleanse, and scour any of the private roads or ways, ditches, drains, watercourses, bridges, or other requisites to be set out and appointed, as thereinbefore directed, at such times, and according to such orders and directions, as should for any of those purposes be contained in writing or orders of the said commissioners, or in the award of the said commissioners, which orders and directions the said commissioners were authorised and empowered to make accordingly, and the same were to be conclusive and binding on all parties, it should be lawful for the owner or occupier of any lands, who should be aggrieved by any such neglect or default, to exhibit a complaint upon oath touching such neglect or default against such person or persons, before any justice of the peace for the county of *Middlesex*, who was to summon the parties concerned, and to examine any witness or witnesses as to the grounds of such complaint; and in case the complaint should appear to be well founded, he should order and direct the person or persons exhibiting such complaint to cause the work in respect whereof such

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complaint was made, to be forthwith made and done according to the directions which should for that purpose be contained in the said writing, order, or award; and also should by warrant under his hand and seal directed to the person exhibiting such complaint, or to any other person, cause the charges and expenses of making and doing the same to be levied by distress and sale of the goods and chattels of the person or persons so neglecting or refusing, or making default, rendering the overplus, if any, after payment of the costs and charges attending such distress or sale, or otherwise occasioned by such neglect, refusal, or default, to the owner or owners; or otherwise the said justice should and might, by writing under his hand and seal, authorise and empower the person or persons exhibiting the said complaint to enter into and upon any of the lands, tenements, or hereditaments of or belonging to such person or persons neglecting or refusing to pay upon demand such charges and expenses, pursuant to the order of such justice, and to receive the rents and profits of the said premises respectively, until thereby and therewith the said charges and expenses, together with the costs and charges occasioned by or attending such entry and perception of the rents and profits of the same premises should be fully paid and satisfied."

The act, after directing specific allotments to be given to certain parties interested in the inclosure, directed that the commissioners should, after the making of such several allotments, and before the sale or sales as therein directed, set out and allot the residue of the said common or allotment of *Enfield Chase*, and the said open and common fields, marshes, and waste lands, in the parish of

Edmonton aforesaid, unto and among the several persons, bodies politic and corporate, who were entitled to any estate, property, or interest therein, according to their respective rights and interests, in such quantities, shares, and proportions, as by the said commissioners should be adjudged and declared to be a compensation and satisfaction for the several and respective rights of common and other rights or interests. In the making such allotments, the said commissioners were to have regard as well to the quantity as to the quality and situation of the land to be allotted to each party.

The act did not provide that any allotment should be made to the churchwardens, nor to the parishioners generally, nor for their benefit. But some gravel-pits were left by the commissioners for the use of the parish.

The commissioners by their award, after setting out and appointing the public ways, awarded as follows : —

“ *Private Carriage Roads.*— And we have in the next place set out and appointed the following private carriage roads over the said Chase allotment, common fields, and common marshes, for the use of the owners and occupiers of lands, tenements, and hereditaments within the said parish of *Edmonton* ; (that is to say,)

“ From *Southgate*, one private carriage road of the width of thirty feet, beginning at the said Chase side road near *Southgate*, and leading northward over the said *Edmonton* allotment of *Enfield Chase*, into the said *Barnet* and *Enfield* road, as the said private carriage road is fenced out and made.”

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This last road was the subject of the indictment, and was a new road fenced out and made by the commissioners, no such road having existed at the time of the inclosure.

“ *Repairs of Roads.* — And we do hereby order, direct, and award, that the said public carriage roads and highways, and the said private carriage roads, together with the several tunnels and bridges made across the same, shall for ever hereafter be repaired, upheld, cleansed, maintained, and kept in repair by the inhabitants and occupiers of lands, tenements, and hereditaments within the said parish of *Edmonton*, in the same manner as public highways are or shall by law be directed to be made and kept in repair (except four occupation roads therein named.)”

From the time of the award in 1802, the road in question, which ran between allotments made to private individuals, and, among the rest, those of the prosecutors of the indictment, had been used by the public in every way, and had been repaired by the parish up to the year 1825, and direction-posts placed thereon at the expense of the parish. It was, in fact, the nearest way from *Southgate* to *Enfield*. In 1825, the inhabitants having, as it was alleged, then first found out that they were not bound to obey the order of the commissioners, discontinued the repairs of the road. And facts were offered in evidence to shew that the parish had been acting under a mistake in repairing the road.

For the prosecution it was contended, that the road, having been used by the public without in-

terruption for upwards of twenty years, must be taken to have been dedicated as a public road; and the parish, having throughout repaired, had clearly adopted the road and the liability to repairs, and could not now throw off that liability, whatever might have been their original rights.

It was also contended that they were bound to obey the order of the commissioners; and that, having so long obeyed it, they could not now dispute it.

For the defendants it was contended, that the order of the commissioners was not binding on the parish to repair this road; that it was set out expressly as a private road "for the use of the owners and occupiers of lands, tenements, &c. within the parish," and was not of the width of public roads; and that the power of the commissioners to order by whom private roads should be repaired, did not extend to the parish, but only to persons interested in the allotments; and this was shewn by the power given to the magistrates to summon the persons liable to repairs, and levy on their goods; and *Rex v. The Inhabitants of Cottingham*, 6 T. R. 20., *Rex v. Richards*, 8 T. R. 634., were cited to shew that the parish were originally not bound; and it was contended that, as they had repaired under a mistake, they were not bound as having adopted the road. That here there were either no owners of the soil to dedicate the road to the public, or the owners were persons interested in charging the parish and relieving themselves from the repair of a road beneficial to them, namely the proprietors of the adjoining allotments,

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whose property, according to the ordinary presumption, the soil of the road was.

Lord TENTERDEN C. J. I should doubt whether that presumption would hold here, where the roads are made under an inclosure act. The presumption that roads are the property of the adjacent owners is founded on the supposition that the roads originally passed over the lands of the owners, and therefore they still belong, *ad medium filum viæ*, to the adjacent owners. (a)

It was then argued that, if so, there was here no dedication at all, and the whole rests on a mistaken liability of the parish. There is certainly no allotment to the inhabitants of the parish, and the property cannot be in them.

Lord TENTERDEN C. J., in summing up, after stating the substance of the two acts and the award, said, The language of this inclosure act and award differ in no substantial respect from that in *Rex v. Cottingham*; the effect is the same in both. The question there was, whether the commissioners had power to direct the repair of private roads by the inhabitants; and I am bound to tell you that this was an order which there is no power of enforcing, and which the inhabitants are not bound to obey. That however is not conclusive of the case. In ordinary cases of dedication, there is an owner of the land; here there is none, except as directed by the acts; and the case will

(a) See 41 G. 3. c. 109. s. 11.

turn on this question only, — whether or no the parish repaired under a mistaken notion of liability. If you think they acted, not on a mistaken supposition, but on a voluntary disposition on their part to repair a road which was certainly useful to a large class of His Majesty's subjects, and for the convenience of the public, then you will convict. If you think it was a mistake, you will acquit.

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Verdict of guilty.

Campbell and R. V. Richards for the prosecution.

Thesiger and Clarkson for the defence.

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SANDYS and Another, Gents., Two, &c. v.
 HORNBY, Gent., One, &c.

WESTMINSTER,
 Feb. 1.

THIS was an action for agency business done in London for the defendant, an attorney in *Portsmouth*.

A bill for agency business done by one attorney for another is not within 3 Jac. 1. c. 7. s. 1.

The plaintiffs had furnished the defendant with accounts regularly, and a letter from the defendant was put in, acknowledging the accuracy of the balance claimed; but no signed bill had been delivered.

R. V. Richards for the defendant submitted, that the plaintiffs must be nonsuited, not having com-

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plied with 3 *Jac.* 1. c. 7. s. 1., and cited the case of *Heming and Another v. Wilton*, 1 M. & M. 529.

LORD TENTERDEN C. J. That could not have been an agency bill. It must have been for original business done for the defendant as a party. (a) The words are, “shall give a true bill unto their masters or clients;” that cannot apply to agency business.

Verdict for the plaintiffs.

R. V. Richards applied for leave to move to enter a nonsuit, or at all events that the plaintiffs should not have judgment of the term; the cause being in the list of those in which judgment was to be entered as of the preceding term, if the Judge should think fit.

LORD TENTERDEN C. J. I think the case so plain that I cannot give leave. The case must take its course.

The plaintiffs accordingly had judgment of the term. (b)

Smirke for the plaintiffs.

R. V. Richards for the defendant.

(a) The bill in that case was, as stated by his Lordship, for business done for Mr. *Wilton* as defendant in a cause.

(b) See *Raynal v. Smith*, *infra*, 84.

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BIGG v. MEGAREY.

WESTMINSTER,
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DEBT.

The first count of the declaration stated, that the plaintiff was the surviving principal land coal-meter for the admeasurement of coals sold by wharf measure within the several parishes of *E.*, &c. under a statute of 47 G. 3., entitled “An Act for repealing several acts for regulating the vend and delivery of coals within” &c. That the plaintiff being so, and having taken such oath as in the said statute is appointed, heretofore, to wit, on, &c. by certain then deputies labouring coal-meters and servants of the said plaintiff, acting under him in the execution of the duties required by the said act, who had respectively taken and subscribed such oath as in the said statute is directed, did inspect and superintend the loading and sending away of divers large quantities, to wit, &c. of coals, which were then and there vended and sold by the defendant as and for good measure, and sent in carts, waggons, and other land carriages, from certain wharfs, warehouses, and other places within the limit or district of the said plaintiff as such surviving principal land coal-meter as aforesaid; whereby and according to the form of the statute, &c. the defendant became liable to pay to the plaintiff, so being such surviving principal land coal-meter as aforesaid, and being the principal coal-meter for the time being of the land coal-meters’ office within the limit of which the said

A person generally employed on commission to buy coals for a retail coal-merchant, but who sometimes, before the receipt of such orders, bought coals, and then let his employer have what he pleased of them, paying him at the same rate as when he had ordered them beforehand, is not to be considered, even with respect to the latter coals, as the *vendor* of them, so as to be liable to the coal-meter for the inspection fee under 47 G. 3. c. 68. s. 95.

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wharfs, &c. are respectively situate, a large sum of money, to wit, &c., being at and after the rate of 1s. for every five chaldrons and one vat of the said coals so brought and sent to the purchasers thereof, as and for a compensation for the trouble of inspecting and superintending the loading and sending away such coals ; and thereby, and by reason of the nonpayment, &c.

There were other counts, varying the statement.

The plaintiff and one *Burnett* were duly appointed by the 47 G. 3. c. 68. s. 74. principal land coal-meters for the district in question, and the plaintiff had survived *Burnett*. The claim arose on the ninety-fifth section of that statute, by which it was enacted, “ that the vender or venders of or dealer or dealers in any coals sold as and for pool measure, and sent in any cart, waggon, or other land carriage from any wharf, warehouse, or other place within the respective limits or districts of the said respective land coal-meters, or any coals ” (stating other modes of delivery, &c. to which there were counts in the declaration corresponding), “ is and are hereby required and directed to pay to the principal meter or meters for the time being of the land coal-meters’ office within the limits of which any such wharf, &c. shall be situate, at and after the rate of 1s. for every five chaldrons and one vat so bought and sent to the purchaser or purchasers thereof, as and for a compensation for the trouble of inspecting and superintending the loading and sending away such coals ; and such money shall be repaid by the purchaser or purchasers of such coals to the vender or venders thereof.”

The only question in the cause was, whether

the defendant was such a vender of the coals in question as to be liable to the plaintiff for the metage.

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All the coals in question were bought by the defendant at the coal-market for one *Glover*, who was himself a coal-merchant; they were delivered in the defendant's lighters at *Wandsworth*, landed there by *Glover*'s labourers, and conveyed thence by *Glover* in his waggons to *Mitcham*, where he paid the *wharf* metage, and sent the coals out to his customers. *Glover* never attended the coal-market himself, but generally sent directions to the defendant to buy for him such coals as he wanted, and allowed him a commission of 1s. per chaldron on his purchases. In some instances however, the defendant, being in expectation of orders from *Glover*, bought coals in the market without receiving any orders, and afterwards let *Glover* have such part of them as he wished for. In these cases he received the same rate of profit or commission, 1s. per chaldron.

F. Pollock for the plaintiff admitted that *Glover* must be considered as the vender of the coals previously ordered by him; but suggested that, as to the remainder, the defendant must be taken to be the buyer of the coals from the ship, and then the seller of them to *Glover*; and if so, he was liable as vender for the metage. If indeed the Court is of opinion that a man, generally employed as agent, and expecting to be so, has a right to purchase beforehand, and supply the articles so purchased to his employer, and still to be considered

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as agent only, and not an intermediate buyer and seller, the plaintiff cannot recover.

Lord TENTERDEN C. J. That is my opinion ; such a transaction is not the case contemplated by this act of parliament.

Nonsuit.

F. Pollock and Kelly for the plaintiff.

Gurney and Thesiger for the defendant.

WESTMINSTER,
 Feb. 3.

BEAUCHAMP v. POWLEY.

A stage coachman is responsible for the loss of a parcel which he receives to carry without reward, if it is lost through gross negligence on his part.

CASE.

The first count stated that the plaintiff caused to be delivered to the defendant a certain parcel, to be carried from *Bedford* to the *Bell and Crown, Holborn*, and there delivered to the plaintiff, and that he accepted it on those terms : breach, that the defendant so carelessly conducted himself that it was not delivered. The second count stated that the plaintiff caused the parcel to be delivered to the defendant, to be kept and securely conveyed and delivered for the plaintiff to one *Wm. Kent*. There were other special counts, and a count in trover. Plea, not guilty.

The defendant was the coachman of a stage-coach : the parcel was delivered to him on the road. It was a small parcel, which the plaintiff had given to Mr. *Fagg*, one of the proprietors

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of the coach, to take and shew it to a particular person, and to return it, if not approved. *Fagg's* servant delivered it to the defendant, to return it to the plaintiff, with the word "value" written on it, and addressed to Mr. *Fagg* at the coach office; and gave him directions to take particular care of it, and deliver it to *Wm. Kent*, the book-keeper, as it was of value. The parcel was not delivered, and on enquiring of the defendant, he knew nothing about it, and had entirely forgotten it: he afterwards suggested two or three modes of enquiring about it, which proved ineffectual. The parcel being delivered on the road, there was no entry of it on the way-bill: and being delivered by the servant of one of the owners, no carriage was charged for it.

Campbell for the defendant. This attempt to charge the coachman is quite new, and cannot be supported. It is not pretended to charge him as carrier: he was to receive no reward, and none is laid in the declaration. If so, he stands in the character of "a mandatary without reward;" and if so, according to *Jones on Bailments*, p. 62., he is "not responsible for less than gross neglect." Breach of faith is not imputed, and gross neglect is described as "want of the care which a man of common sense, however inattentive, takes of his own property." *Ib.* p. 8. A carrier generally contracts to deliver, but this man is not charged as carrier. Besides, whatever may be his absolute liability, the declaration will not enable the plaintiff to recover. The count in trover is out of the question: the mere loss of the parcel is no conver-

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sion, and the special counts are not proved : they proceed, although framed in tort, on a contract between the plaintiff and defendant, and on the facts there is no privity between them. The defendant received the parcel from *Fagg*, and the plaintiff had not even his name on it : the defendant therefore did not receive it for him, and knew nothing about him.

Lord TENTERDEN C. J. There is certainly no evidence of a conversion to support the count in trover ; but if the jury are of opinion against the defendant on the question of fact, which I shall leave to them, I think the first and second counts will apply to the case. That question will be, whether there was gross negligence on the part of the defendant. Nothing was to be paid for its conveyance ; but still, if the coachman received it, it was his duty to take care of it, and deliver it at the office in *Holborn*, to which it was addressed. The parcel was of value, and known to him to be so ; and it being his duty to deliver it, the jury are to say whether there was great negligence on the part of the defendant ; if there was not great, and somewhat extraordinary, negligence on his part, the verdict ought to be for him.

Verdict for the plaintiff.

Sir J. Scarlett and *Evans* for the plaintiff.

Campbell and *Platt* for the defendant.

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WILKINS and Another v. JADIS.

WESTMINSTER,
Feb. 5.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange.

The defence was that the bill had not been properly presented for payment to the acceptor, and also that there had not been due notice of dishonour.


The presentment was made at half past seven P.M., at the house where the bill was made payable. The party taking it knocked at the door, and rung the bell, but no one answered. The house appeared to be inhabited. It was not a banking-house.

The only evidence of notice of dishonour was, that the defendant, two days after the maturity of the bill, sent a person to the plaintiffs, to say that he had been defrauded of the bill, and should defend any action brought upon it.

Campbell for the defendant. The evidence, both of presentment and of notice of dishonour, is insufficient. The presentment was not made within the hours of business, and a party is not bound to have any one in waiting beyond them for the purpose of making payment. On this principle, presentment at a banking-house, after the hours of business, has been held insufficient, *Elford v. Teed*, 1 M. & S. 28.: and though it has since been considered that presentment in the evening at a banker's was sufficient, *when there was some one there*, who refused payment on the ground of having no orders, *Garnett v. Woodcock*, 6 M. & S. 44.,

Presentment of a bill at half-past seven P.M., at a dwelling-house where it is made payable, is sufficient.

Proof that the drawer of a bill knew, two days after its maturity, that it was unpaid, and in the hands of a particular indorsee, and objected to pay it on the ground of fraud in the obtaining of it, is evidence to go to a jury that he had received regular notice of dishonour.

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that is the extreme point to which any case has gone. Here there does not appear to have been any one in the house, and there is no authority for holding a presentment made under those circumstances sufficient. Then, as to the dishonour, it is not enough that the defendant knew that the bill was dishonoured, proof must be given that he received notice from some of the parties to the bill. The evidence here only shews that the defendant was aware of the dishonour; and that is not enough.

LORD TENTERDEN C. J. I have no doubt on the first point. The presentment for acceptance was properly made. The acceptor was bound to have some one at the house at the time, to pay the bill if it were presented. On the other objection, it will be a question for the jury, whether the defendant had received notice from the plaintiff, or some party to the bill. They certainly must be satisfied that notice was given; mere knowledge of the dishonour is not sufficient. But is there not evidence of notice? The communication that any action will be defended, is not put on the ground of want of notice, but on fraud; and at that time the defendant knew the holders. How was he likely to know that fact, unless by having received notice? It is a question of fact for the jury, whether he had so, or not; and their verdict will be given accordingly.


Verdict for the plaintiffs.

Gurney and Thesiger for the plaintiffs.

Campbell for the defendant.

In *Easter* term *Campbell* moved for a new trial on the ground taken at *Nisi Prius*, that there was no presentment at a proper time; contending, that although the presentment might have been good, if there had been any one there to answer, the holder took the risk upon himself by going so late, and discharged the other parties, if he did not find the acceptor. He distinguished the case from *Barclay v. Bailey*, 2 Camp. 527., which he said was the strongest case against him, on the ground that in that case there was an answer: and he referred to the bankers' cases, namely, *Parker v. Gordon*, 7 East, 385., and those cited at the trial.

The Court refused the rule, saying, that the practice with respect to bankers had reference to their known hours of business; that in other cases the question was, whether the bill was presented at a reasonable hour: and *Littledale J.* said, he thought it was, at least, quite in time up to eight o'clock.

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See also *Morgan v. Davison*, 1 Stark. 114.

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WESTMINSTER,
Feb. 5.ELLIOTT and Another, Executors of JOHN
ELLIOTT, *v.* ELLIOTT, Administrator *de*
bonis non of LETTSOM.

Payment of a bond is not to be presumed after more than twenty years, if the money was lent to enable the obligee to go abroad, where he died shortly after, and there is evidence that his administrator never received any assets.

DEBT on a bond to recover 450*l.* from *Lettsom* to *John Elliott*, dated *April* 14. 1808. Plea, payment.

Sir *J. Scarlett*, for the plaintiffs, after admitting that the lapse of time since the date of the bond made a *primâ facie* case in support of the plea, gave the following evidence in answer to it: —

The bond was given for money lent to *Lettsom*, to fit him out for a voyage to *Tortola*, where he was going to be married. The marriage took place, but *Lettsom* died within three months of his arrival at *Tortola*; and there was some evidence that nothing was ever realised as his wife's fortune. He had a vested interest in some property in *England*, after the death of his mother; but she died only a year before the action brought. There was evidence also that the defendant had stated that he himself had never received any assets until the death of the mother, and that he was not aware, and did not believe, that the original administrator ever had. The administrations were taken out for the purpose of making a personal representative in some proceedings in Chancery: the first was dated in 1810; the second, that granted to the defendant, in 1817. On each occasion the personal property was sworn under 20*l.*

Evans for the defendant said that his client acted as a trustee, and was bound to see the *primâ facie* case of payment rebutted: that he made no objection to the claim of the plaintiffs, if the Court thought the evidence sufficient.

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LORD TENTERDEN C. J. I think it is. It is impossible, under these circumstances, to suppose that the money was paid. (a)

Verdict for the plaintiffs.

Sir *J. Scarlett* and *Talfourd* for the plaintiffs.

Evans for the defendant.

(a) *Newman v. Newman*, 1 Stark. N. P. C. 101.

CARR, Administratrix, &c. v. ROBERTS.

WESTMINSTER,
 Feb. 5.

COVENANT.

The action was brought on a deed, whereby the intestate assigned all his property to the defendant, in consideration of an annuity to be paid to him for his life, and also of the defendant's taking upon himself the payment of all debts due from the intestate, and of an annuity previously granted by the intestate to one *A. B.* The declaration stated a covenant by the defendant to indemnify the intestate against the payment of this annuity; and assigned as a breach, that a large sum, 500*l.*, was due from the intestate during his

An administrator, who has been compelled to pay an annuity for which his intestate was liable, may recover on a plea of *ne unques administrator* against a party who had covenanted to indemnify the intestate against such payment, though such

claim of indemnity has not been taken into account in the amount of the stamp on the letters of administration.

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lifetime for arrears of this annuity, and that the defendant did not pay those arrears, nor indemnify the intestate, and the plaintiff since his death, against them.

The defendant pleaded, among other things, that the plaintiff was not administratrix, &c.


The annuity was in arrear for the time stated in the declaration, and *A. B.*, the annuitant, had brought an action against the plaintiff, to which she had confessed assets to the amount of 20*l.*, and *A. B.* had taken judgment for that sum immediately, and a judgment of *assets quando* for the remainder. The costs in that action were 14*l.*, and these and the 20*l.* had been paid.

There was no evidence of any assets beyond the 20*l.* so confessed ; and the letters of administration had no stamp, none being necessary unless the estate is above the value of 20*l.*

J. Williams for the defendant objected, that the title of the plaintiff, as administratrix, was not proved. The sum to be recovered in this action is part of the intestate's property, and ought therefore to have been included in the valuation of the estate. *Hunt v. Stevens*, 3 Taunt. 113. If it had been, a stamp would have been necessary.

Campbell for the plaintiff. A mere contingent right to recover damages, as this was at the time of taking out the administration, cannot be reckoned as part of the intestate's estate. It was not to be supposed that the defendant would fail to pay the annuity ; and, unless he did, the plaintiff would take nothing under the covenant. Besides, if the plaintiff, or the intestate in his lifetime, re-

covered against the defendant, they would hold the proceeds only as trustees for the annuitant; and property held merely as trustee is expressly excluded from the valuation by stat. 55 G. 3. s. 184. *shed. part 3.*

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J. Williams. The intestate, or the plaintiff, upon recovering on this covenant, would certainly be liable to the annuitant to the same amount; but that does not make them trustees of that money. And unless they are trustees, the money must be taken into the account: for the duty attaches on the whole sums which are to be got in, without any regard to the deductions to be made from them.

LORD TENTERDEN C. J. The case of *Hunt v. Stevens* was an action of trover for goods. Unless they belonged to the intestate, the plaintiff had no claim: and his right thus depending on the intestate's actually having the property in them, it was held that they ought to have been included in the estimate of the administration duty. In the present case it was utterly impossible, at the time of taking out the letters of administration, to say whether there would ever be any occasion to resort to the covenant of the defendant. Such a contingency could not be a matter of valuation. I think therefore that it is impossible to treat such a covenant, or the damages to be recovered under it, as part of the estate of the intestate.

Verdict for the plaintiff.

Campbell and White for the plaintiff.

J. Williams for the defendant.

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WESTMINSTER,
Feb. 9.

DOYLE v. DALLAS.

A ship, being wrecked, was sold by the owner and master, and soon afterwards got off by the purchaser and repaired, though at a great expence.

The owner cannot treat this as a total loss, unless the sale at the time, in the exercise of a sound judgment, appeared most beneficial for all parties.

If the ship was likely to be repairable, so as to come to England with any cargo, so as upon her arrival to be worth the sum laid out on her, it cannot be treated as a total loss, though she cannot be made fit to carry the cargo originally intended for her.

ASSUMPSIT on a policy of insurance at, from, and to any port or ports, place or places whatsoever, for the space of a year from *October* 19th, 1827, upon the ship *Triton*; averring a total loss, by perils of the sea.

The plaintiff was the owner and master of the ship *Triton*. She had been some time at *Monte Video*, and sailed thence to *Buenos Ayres*, and arrived there in the outward roads on the 6th of *October* 1828. The following day she was taken by a pilot to the inner roads, and anchored there. On the 11th, it was observed that she did not swing with the tide, and on examination it appeared that she had struck, and leaked very fast. Efforts were ineffectually made to move her from the place where she was; and the cargo was almost entirely discharged; but the water gained so fast on the pumps that the ship sunk the next morning, the morning of *October* 12th, and lay on her side, completely under water at high tide, but partly above water at low tide. Before this time the cargo had been almost entirely removed. On the morning of the 12th, the plaintiff, without going first to the vessel, went to *Lloyd's* agent at *Buenos Ayres*, to give notice of abandonment; but it did not distinctly appear whether such notice was actually given. On the 13th, the ship

Semble, That the law would be the same if she could only return *in ballast*. The loss of *the voyage* cannot make a constructive loss of *the ship* on a policy on the ship only.

was surveyed by some captains of ships approved by the plaintiff and by *Lloyd's* agent at *Buenos Ayres*, who went on board at low water, and they advised that she should be sold, on the ground that the expense of raising her, especially as she had a great weight of coals and ballast on board, and the tides and weather very uncertain, would probably be more than she was worth. Accordingly on the 18th, her hull and masts and some coals, and a few other articles left on board (her principal stores and tackle having been removed) were sold for 660 dollars currency. Her rudder, rigging, and other tackle were also sold for the sum of 4540 dollars currency.

The level of the water in the river *Plate* is very much affected by the winds which blow : a south-west wind, called a *pampera*, raising the water, a northerly wind depressing it : the difference in level thus occasioned is often not less than a fathom. On the day of the loss there was a south-west wind, and this continued, and during much of the time with very great violence, up to and after the time of the sale of the hulk. It changed to the northward afterwards, and the water became unusually low in consequence. The purchaser took advantage of this ; and the vessel being in great part above water on the 20th by reason of the lowness of the river, he continued to get her much lightened at low water, and to float her at the rising of the tide, and thus to remove her and anchor her nearer the shore.

The *Triton* was described as a teak vessel. After the removal of the cargo, at the time of the accident, little was left on board, except about ninety

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tons of sand ballast and forty tons of coals. The plaintiff had at this time entered into a contract for a homeward freight of hides, by which he would have netted about 1200*l*. After the *Triton* was raised, it was found that she leaked very much the first day, but the leak was pretty well subdued after that time, though she required continual pumping till the repairs were done. On examination, it appeared that she had struck upon the anchor of a vessel which was lying sunk ; and after the copper was stripped off to repair her, it was found that the anchor had penetrated a streak of pine in her bottom, of which, though she was described as a teak ship, there were found to be three. The pine swelled with the water ; and by this means, and by the caking about the leak of the sand and coals, the leak was much diminished from its original extent, and thus the ship was raised in the manner already mentioned. If the leak had been made in teak, which is a hard wood, and does not swell in water, there would have been no possibility of floating and repairing the ship.

The value of the *Triton* before the accident was about 2500*l*. or 3000*l*. ; the insured value was 2500*l*. The expense of raising her was about 2000 dollars, and 2000 more were expended in refitting her with some of her old spars and tackle, pumping her and keeping her afloat, and bringing her to *Ensenada*, a small harbour about fifty miles from *Buenos Ayres*, but the nearest place at which she could be repaired, and the expense of the repairs done there was 12700 dollars. They had not there the means of recoppering her, but they put her in such a condition that she sailed to *Rio Janeiro*. Some

further repairs, to the amount of about 5000 dollars, were done there, making, in all, an expense of about 1350*l*. She was not however coppered, which would have cost about 300*l*. in *England*. Without being coppered, she would not have been fit to carry a cargo of hides from *Buenos Ayres* to *England*; but she might, after being repaired as she was, have sailed to *England* in ballast, or with some sorts of cargo. The repairs actually made enabled her owners to use her as a coasting vessel at *Rio Janeiro*.

The vessel was sold several times before she was repaired at *Ensenada*, once for 6000 dollars; but the last time, after the expending of the first 4000 dollars in raising her and keeping her afloat, but before the substantial repairs were done, she was sold for 3200 dollars. A dollar currency is worth a little more than a shilling sterling.

On this state of facts, the plaintiff claimed to recover for a total loss: the defendant contended that it was a partial loss only, and paid into court a sum, as he represented, sufficient to cover its amount. It was agreed that the verdict should be taken for the plaintiff, if the loss were total; for the defendant, if partial: leaving the actual amount of loss, and the sufficiency of the payment into court, to be settled in that case by a reference.

Sir *James Scarlett*, in opening the case for the plaintiff, had detailed the facts, and had contended that the plaintiff, if he acted for the best, and as he would have done for his own interests if uninsured, was entitled to treat this as a total loss, and to recover in the action.

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F. Pollock for the defendant. There is no abandonment in this case; the plaintiff's right therefore depends entirely on the question, whether, under the circumstances, he was at liberty to treat this as a total loss, and to sell the ship. It was not, in fact, a total loss, for the ship is now in existence, and sailing about. It cannot however be disputed, that according to the established rules of law, however mischievous in this respect they may be, there may be a constructive total loss. But to make a loss of this description, there must exist an absolute necessity to sell; if not, the loss is only partial. This was the opinion of *Dallas* C.J. in *Maeburn v. Leckie*, cited in *Abbott on Shipping*, p. 6., and more fully stated in a report of the trial published by the committee of *Lloyd's*. So also in a recent case of *Somes v. Sugrue*, *Tindal* C. J. said, "The ship must be sold under such circumstances, that any man of prudent and sound mind would feel himself capable of taking no other alternative than that of selling the ship." The same doctrine was held in *Robertson v. Clarke*, 1 Bing. 445.; and in *Idle v. Royal Exchange Assurance Company*, 3 Br. & B. 151. n., where, upon error from a judgment of C. P., a *venire de novo* was awarded, on the ground that the necessity of the sale was not to be inferred from the facts stated on the special verdict. And in analogy to these decisions, it is laid down in *Abbott on Shipping*, p. 2., that the authority of the master to sell the ship only exists in cases of extreme necessity. But if the authority of the master is generally to be taken thus strictly, much more must it be so when the interests of underwriters come in question; and it may well be

doubted, whether any circumstances justify a master, who is also owner as in this case, in converting a partial into a total loss. A mere master may act for the benefit of all parties; but this power is not, as against the underwriters, to be intrusted to an owner, whose interests are opposed to theirs. At all events, such a transaction must be very strictly watched. In the present case, if the plaintiff had got the vessel up, (as he might have done, for the purchaser did so two days afterwards,) and had then found the expense of repairs greater than the value of the ship would be when repaired, he might perhaps have been entitled to treat it as a total loss: but he was not justified at the time, and under the circumstances, in doing so, without further attempts to save her; and the fact, that she was almost immediately afterwards recovered, and is now in service, is the strongest proof that there was not that necessity which could alone justify the sale, for expediency is not sufficient. He then proceeded to comment minutely on the facts of the case, especially as to the short time intervening between the accident and the sale, and the amount of expense finally incurred by the purchasers.

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Sir *James Scarlett* in reply. Nothing turns on the fact of abandonment: the plaintiff had, at all events, a right to treat this as a total loss. At the time of the sale there was no probability that the ship could be raised; she only was raised in consequence of an unforeseen and improbable change of weather. Even after she was raised, all the circumstances shew that the plaintiff acted rightly,

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for more than 1300*l.* was actually expended on her ; and even now she is not fit to come to *England* with a cargo, though perhaps she might possibly be got over in ballast. Was it then worth while to repair her at such an expense ? If not, the plaintiff acted right in the result : at all events, at the time of the sale, he exercised a sound discretion ; and if so, he is entitled to recover.

Lord TENTERDEN C. J., in summing up to the jury, said, The only question is, whether this amounts to a total loss ? The ship is not bodily and specifically lost ; but circumstances may have occurred which, according to the law established in cases of marine insurance, are equivalent to a total loss. I think the circumstances in this case will have that effect, if at the time of the sale, that measure, on the sound exercise of the best judgment, appeared most beneficial to all parties. It is not enough that the owner acted honestly in the sale, and intended to do for the best : the underwriters are not liable unless he formed a correct judgment, that is to say, the best and soundest judgment which could be formed under the circumstances which then existed. Nothing less than this, in my opinion, will make a total loss, while the ship continues in existence.

Now the correctness of this judgment would depend on two circumstances : the probability of being able to raise the vessel at all ; and the power of repairing her, if raised, at a price rendering it worth while to do so. With respect to the first of these questions, the sale certainly took place very soon. There seems to have been a great change

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in the level of the water after it; more perhaps than could have been anticipated at all, and at all events there was no reason for expecting it so soon. But it was known that the height of the water did vary greatly with the variation of the winds; and I think that on the day of the survey, when it was determined to sell the vessel, it must have appeared uncertain whether she might or might not be raised. But assuming that she would be so, still there would be the question, whether it was worth while to repair her? His Lordship then stated the evidence as to the expense of so doing.

Besides this evidence of expense, it is proved, that after all these repairs the ship still was unfit to sail for *England* with a cargo of hides, such a cargo as the plaintiff had contracted for. I do not think that circumstance enough to justify the sale. The underwriters do not undertake that the ship shall be able to carry this or that cargo. If the ship could have come to *England*, even in ballast, I think, (certainly with *any* cargo,) so that on her arrival she would have been worth the money expended on her, she ought to have been repaired for the purpose. The loss of the voyage will not, in my opinion, make a constructive total loss of the ship. Some cases have been so decided; but as the thing insured remained *in specie*, I do not think that amounted to a total loss. The best thing for the underwriters must be done, not merely for the owner; and as they indemnify only against the loss of the ship, the loss of the voyage would not injure them. Taking all the circumstances into consideration, if you are of opinion

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that the plaintiff, in acting as he did, exercised a sound judgment, as well for the benefit of the underwriters as for his own interest as owner, and did what, at the time, was best for all parties, your verdict will pass for the plaintiff; if otherwise, for the defendant.

Verdict for the defendant.

Sir *J. Scarlett*, *Campbell*, and *Platt* for the plaintiff.

F. Pollock and *Maule* for the defendant.

In *Easter* term Sir *J. Scarlett* moved for a new trial, on the ground that the verdict was against evidence; but the Court refused the rule.

Cambridge v. Anderton, 2 B. & C. 691. S. C. R. & M. N. P. C. 60.

KENNEY *v.* MAY and ANOTHER.

WESTMINSTER,
Feb. 10.

The constable who swears the appraisers of a distress under the stat. 2 W. & M. sess. 1. c. 5. § 1. must attend with the appraisers at the time of the appraisement, and must swear them *before* they make it.

CASE for irregularity in a distress, in not causing goods to be appraised by a sworn appraiser according to the statute.

The evidence for the defendant shewed that the appraisers appraised the goods on the premises, and then went to the house of the constable, and were there sworn to the truth of the appraisement.

J. Williams and *Butt*, for the plaintiff, objected, that the constable must attend with the appraisers at the time the goods are appraised, and must swear them *before* they make their appraisement, and cited a case which they said was decided to that effect; but they did not produce it at the trial.

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 ANOTHER.

Gurney and *Erle*, for the defendants, contended that the statute 2 *W. & M. sess.* 1. c. 5. s. 1. does not require the formalities insisted on by the plaintiffs.

LORD TENTERDEN C. J. I am clearly of opinion that the objection is good on both grounds; and that the intention of the act to protect the tenant will be effected by declaring this to be the law. It is a requisite which is very seldom complied with, from not being generally known.

Verdict for the plaintiff, 1s. damages.

J. Williams and *Butt* for the plaintiff.

Gurney and *Erle* for the defendants.

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 ADJOURNED SITTINGS IN LONDON.

 GUILDHALL,
 Feb. 15.
HALL *v.* WILCOX.

One of the makers of a joint promissory note may show that he was a mere surety for the other party, and so known to the plaintiff, the payee of the note, and that the plaintiff has taken a composition from the principal debtor.

ASSUMPSIT by the payee against the maker of a promissory note for 50*l.*

The note was joint with *Honeysett*. It was proved on the plaintiff's evidence that *Honeysett*, who was a publican, had applied to the plaintiff, a brewer, for a loan of 50*l.*; and on the plaintiff's requiring security, *Wilcox* agreed to join with *Honeysett* in the promissory note. *Honeysett*, after some time, fell into difficulties, and the plaintiff took half a crown in the pound as a composition for this and other demands, having arrested him, and discharged him on payment of that sum. The sum paid reduced the plaintiff's demand on the note to 40*l.* It was doubtful on the evidence, whether this was not done with the defendant's consent.

Sir *J. Scarlett* for the defendant insisted that it was not done with his consent; and the defendant, being a known surety, must be discharged.

F. Pollock, for the plaintiff, contended that the note being a joint note, without any mention of suretyship, the defendant must be considered as a principal; that he could not be allowed to allege he held any other character than that which he assumed in the note.

Lord TENTERDEN C. J. said he was of opinion that as the note was made and given to the plaintiff

with the knowledge that the defendant was only a surety, the defendant would be discharged unless the composition was taken with the express consent of the plaintiff.

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This question was left for the jury, who found a
Verdict for the defendant.

F. Pollock and *Comyn* for the plaintiff.

Sir J. Scarlett for the defendant.

Chitty on Bills, 193 a. *Perfect v. Musgrave*, 6 Price, 111. *Price v. Edmunds*, 10 B. & C. 578., in which the admissibility of such evidence was much doubted.

BALDWIN v. DIXON.

GUILDHALL,
Feb. 16.

ASSUMPSIT on a warranty that a horse was sound.

For the defendant, *Campbell* called the person from whom defendant had bought the horse under a warranty of soundness.

In an action on a warranty of a horse, the vendor of the horse to the defendant, who gave a similar warranty on that sale, is a competent witness for the defendant.

Sir J. Scarlett objected that the witness was incompetent, inasmuch as he was liable to the defendant for the damages and the costs in this action.

Lord TENTERDEN C. J., after mentioning a case from the Midland circuit, which afterwards came before this Court, and looking into the books on evidence, said, as he could find no authority, it

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would be safer to receive the witness, giving the plaintiff leave to enter a verdict, in case the Court should think he was incompetent.

Verdict for the plaintiff.

Sir *J. Scarlett* and *Pollock* for the plaintiff.

Campbell and *R. V. Richards* for the defendant.

GUILDHALL,
Feb. 18.

LOVELOCK v. KING.

Where work is undertaken on contract at a given price, the employer is not liable to any greater amount by consenting to alterations from the original plan, unless he is either expressly informed, or must necessarily, from the nature of the work, be aware, that the alterations will increase the expense.

ASSUMPSIT on a carpenter's bill for alterations in a house of the defendant.

This was one of the common cases in which work was originally undertaken on a contract for a fixed sum, and alterations subsequently made, on which the plaintiff claimed to abandon the contract, and recover a measure and value price for the work actually done. The original contract was for 62*l.* 10*s.*: there was some entirely additional work done under a separate contract for 10*l.*; and there were considerable alterations and departures from the original plan, which there was the usual evidence that the defendant had seen, and had not objected to, and in some cases that he had expressly approved of them. Among these were the alteration and enlargement of a window, which were proved to have occasioned an increased expense of 5*l.* The defendant had paid 82*l.* in all: the plaintiff's witnesses stated the

value of the whole work at 140*l.*; the defendant's witnesses stated it below the sum actually paid.

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LORD TENTERDEN C. J., in summing up to the jury, observed that the case, although very common in its circumstances, involved a very important principle, and required their very serious consideration. In this case, as in most others of the kind, the work was originally undertaken on a contract for a fixed sum. A person intending to make alterations of this nature generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on this estimate whether he proceeds or not. It is therefore a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce any increase of labour and expenditure; and I do not think that the mere fact of assenting to them ought to deprive him of the protection of his contract. Sometimes, indeed, the nature of the alterations will be such that he cannot fail to be aware that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character. I think the jury would do wisely in considering that a party does not abandon the security of his contract by consenting that such alterations shall be made, unless he is also informed at the time of the consent that the effect of the alteration will be to increase the expense of the work. In the

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present case it is not pretended that any such caution was given; and it does not appear to me that any of the alterations, except that of the window, the additional cost of which the money paid is enough to cover, were of such a nature as necessarily to import an increase of expense. The question however is entirely for the jury; and it is of great importance, from the frequency of such cases, that they should adopt a correct principle in its decision.

Verdict for the defendant.

Campbell and *F. Kelly* for the plaintiff.

Gurney and *Steer* for the defendant.

GUILDHALL,
 Feb. 19.

BARBER, Executrix of BARBER, v.
 MORRIS.


A sale by auction of a policy of assurance on the life of a third person, cannot be invalidated on the ground of fraud, because the particulars of sale did not mention that the vendor had only a redeemable interest in the life of the party insured, although that interest is afterwards redeemed, if the practice of the office is to pay such policies without inquiring into the continuance of the interest, and if there is no misrepresentation or improper concealment of facts by the vendor.

ASSUMPSIT.

The first count of the declaration stated, that the defendant, in the lifetime of *Barber* the testator, to wit, on *March 23. 1825*, put up for sale by public auction a certain policy of assurance, described as a policy of assurance for 700*l.* effected with the *Pelican Office* on *September 18. 1813*, on the life of a gentleman then in the thirty-third year of his age, subject to the annual payment of 19*l.* 19*s.* 7*d.* upon and subject to certain conditions of sale, which stipulated for the immediate payment

Evidence of the course of the office as to payment in such cases, is receivable.

of a deposit and the signing an agreement to complete the purchase within a month ; for the assigning the policy on the completion of the purchase ; for the apportionment of the auction duty, and for making an allowance in the price in case of any error or misstatement in the particulars of sale. The count then stated that *Barber*, the testator, became the purchaser, and paid the deposit and his share of the auction duty, and signed the agreement required ; and averred mutual promises by him and the defendant to perform their respective parts under the conditions of sale, and a promise by the defendant that he had lawful right and full power to sell and assign over the said policy. It then stated as a breach, that although *Barber* performed every thing remaining on his part to be performed, and the defendant made to him a certain assignment, purporting to be an assignment of the policy so put up to sale as aforesaid, yet the defendant, contriving &c., deceived &c., in this, that he the said defendant, at the time of the sale or of his said promise and undertaking, or at any time since, had not lawful right or any power to sell or assign over the said policy ; and that at the time of the sale and promise, he, the said defendant, had an interest in the life of the said gentleman, upon whose life the policy was effected, only during the continuance of a certain redeemable annuity, and not an indefeasible interest to continue during the whole of such life. The declaration then averred, that after the sale and assignment of the policy, and during the continuance of the life insured, the annuity was redeemed, and thereupon the defendant's interest in the life ceased, and

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the policy became of no value to the purchaser; and alleged the payment by the testator and the plaintiff of several premiums on the policy as special damage.

The second count varied from the first, in laying as a breach that the defendant did not complete the said sale, but made to *Barber*, the testator, "an assignment purporting to be an assignment of the said policy so sold as aforesaid, when, in truth and fact, the policy thereby assigned was not the policy so bought and sold as aforesaid, but was a policy of little or no value." There was also a count stating a promise by the defendant that the policy "was a good and valid policy, effected upon and in respect of a valid and lawful interest in the life thereby insured to the value of 700*l.*, which would continue and endure during the whole of such life;" and, by way of breach, negating the existence of such an interest, and stating that the interest afterwards, and during the life insured, ceased and determined, whereby the policy became of no value. There were other counts varying the statement, and the common money counts. The defendant pleaded the general issue.

By deed of *September* 18. 1813, in consideration of 700*l.* lent to him, one *Hornsby* granted to the defendant an annuity for his life, redeemable on certain terms therein specified. The defendant effected the policy in question on the life of *Hornsby* with the *Pelican* Office on *September* 21. 1813. About the end of 1824, *Hornsby* agreed with one *Barfield* for a loan of money at less interest than he paid the defendant, and gave notice

to the defendant in *December* in that year that he would pay off the annuity. Instructions were given to counsel to prepare an assignment of the annuity to *Barfield*, who was to have this as a security, though the rate of interest really paid was to be reduced; and the draft of the assignment was approved by the defendant's counsel in *April* 1825. That assignment was executed on *May* 24. 1825, and the money paid soon after. Before *April* 1825 the defendant applied to the *Pelican* Office to repurchase the policy, and they offered him sixty guineas for it; but he thought the sum inadequate, and refused it. He then put it up for sale, describing it in the manner stated in the declaration, and *Barber*, the testator, who was an attorney, became the purchaser; and the purchase was completed, and the policy assigned to *Barber*, on *April* 8. 1825. *Hornsby*, on whose life the insurance was effected, was alive at the trial of the cause.

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F. Pollock for the plaintiff, in stating the case, said, that these facts would entitle the plaintiff to recover the damages he had sustained by the purchase of an interest very different from that offered for sale. From the time that the annuity was paid off, or assigned over, the defendant had no insurable interest in the life of *Hornsby*. *Godsall v. Boldero*, 9 East, 72. At the time of the sale of the policy, the defendant knew that he was about to be paid off, and, therefore, that his interest would cease, for he must be considered as cognizant of the law; and if so, he misrepresented the substantial nature of the interest he proposed

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to sell, and the sale is not binding on the plaintiff.

The facts opened were then proved; all the facts relating to the defendant's own conduct being proved by his admission. One of the witnesses examined for the plaintiff, a clerk in the *Pelican* Office, stated on cross-examination, that it was the practice of that office to pay policies, on which the premiums had been regularly paid, without any enquiry as to the existence of an insurable interest.

F. Pollock for the plaintiff objected to the receipt of the evidence. A practice of this kind, if it exists, is not binding on the office; and a purchaser is not bound to accept a mere expectation that it will be acted on: he is entitled to have a legal claim transferred to him. Besides, the practice is not uniform, for *Godsall v. Boldero* was a case brought against this very office, and which they defended on the ground that there was no insurable interest.

LORD TENTERDEN C. J. admitted the evidence; and the witness stated the present practice to be such as he had before mentioned; that after the trial of *Godsall v. Boldero* the business of the office had suffered, and they had therefore changed their course of proceeding; and that if they were to make the enquiries supposed, they might as well shut their doors.

Sir *James Scarlett* for the defendant, in addressing the jury, said, that there was no pretence of

fraud in this case. At the time of the sale, there was a legal interest subsisting, and corresponding with that proposed to be sold. Besides this, even when the interest ceased to exist, it is clear that the policy would be paid, if regularly kept up till that time; and there is therefore the substantial interest contracted for. An expectation of this kind may legally be the subject of sale, if any one chooses to buy it. Even a party to a bet may receive money for his interest in that bet, though the bet is illegal. Here the insurance at the time was actually a legal and subsisting instrument, and the money will be paid when it becomes due, unless the plaintiff shall have discharged the insurance office by failing to pay the premiums.

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Lord TENTERDEN C. J., in summing up to the jury, said,—The question for your consideration will be, whether, at the time of the sale, the defendant made any improper concealment of facts within his knowledge; if he did so, the contract is void, and the plaintiff entitled to recover. It is true, that in point of law, after the annuity was redeemed, the defendant had no insurable interest, and the payment of the policy could not be enforced. But though the law would not compel such payment, there may be good reason for expecting that it would really be paid. In fact, it appears to be the practice of the office to pay such policies, and the defendant would know that it was so, for he had himself applied to the office to purchase the policy in question, and no enquiry was made as to the continuance of the insurable interest: they only disagreed as to the amount of the purchase.

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There does not seem to have been any intention on his part to misrepresent: he conceals no part of his conduct on the occasion; and it is to be observed, that *Barber*, the purchaser, himself an attorney, must have seen that the policy was upon the life of a third person, and might have asked, if he had thought it of importance, what interest there was to insure. If, under these circumstances, you are of opinion that there was any improper concealment of facts, for there is certainly no direct misrepresentation, you will find for the plaintiff, but not otherwise.

Verdict for the defendant.

F. Pollock and *Channell* for the plaintiff.

Sir J. Scarlett for the defendant.

In *Easter* term, *F. Pollock* moved for a new trial, but the Court refused the rule.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN C. P.

AT THE SITTINGS AFTER
HILARY TERM,
1 W. IV. 1831.

SITTINGS AFTER TERM, AT GUILDHALL.

SHERMAN *v.* BARNES.

1831.

GUILDHALL,
***Feb.* 18.**

CASE for negligently driving against the plaintiff's horse.

The horse was at the time of the accident drawing a coach of the plaintiff's.

Wilde Serjt. called the plaintiff's servant, who was driving his coach at the time. On his being objected to, *Tindal* C. J. at first said, that the interest was not near enough to render him incompetent; that the gist of the action not being the servant's negligence, the record would not be evidence; that the mere circumstance of an action being likely to be brought against the witness was not enough.

In case for negligently driving against the plaintiff's horse, the plaintiff's servant, in whose charge the horse was, is incompetent for the plaintiff.

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The witness was in part examined, when *Morish v. Foote*, 8 Taun. 454., was mentioned by *Russell Serjt.*; and *Moody, amicus curiæ*, stated that Lord *Tenterden*, in obedience to that authority, always required a release.

TINDAL C. J. I must certainly consider myself bound by a decision in *banc* of this Court, and though I thought otherwise in principle, must reject the witness. The witness was accordingly withdrawn, and the evidence struck out.

Verdict for the plaintiff.

Wilde and *Adams Serjts.* and *Manning* for the plaintiff.

Russell Serjt. for the defendant.

SPRING ASSIZES, 1 W. IV.

WESTERN CIRCUIT.—EXETER.

Coram TAUNTON J.

EXETER.

REX v. PALMER.

A party in pursuit of game at night, provided with a stick or bludgeon, is not armed with an offensive weapon, unless

INDICTMENT under 9 G. 4. c. 69. s. 9., for being out by night for the purpose of taking game, armed with a bludgeon.

It appeared in evidence that the prisoner, on the occasion in question, had with him a thick weapon, unless the jury find that he took it with intent to use it as such.

stick large enough to be called a bludgeon, but also that he was in the constant habit of using the same stick as a crutch, being lame.

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 REX
 v.
 PALMER.

TAUNTON J. held, that it was a question for the jury, whether the defendant had taken out the stick in question with the intention of using it as an offensive weapon, or merely for the purpose to which he usually applied it ; and that though this was a weapon within the meaning of the statute, and might have been used as an offensive weapon, yet unless the defendant had taken it out with the intention of so using it, the indictment could not be sustained.

The prisoner was acquitted.

Bere for the prosecution.

Cockburn for the prisoner.

TAUNTON.
Coram PARK J.

REX v. GOUGH and Others.

TAUNTON.

THE prisoners were indicted for robbing *J. Clinch*, and on a second count for an assault upon him with intent to rob.

At the conclusion of the case, *Park J.* called on the counsel for the prosecution to elect upon which count the question should be left to the jury, and further enquired, why these two counts had been joined.

Semble, that a count for robbery, and for an assault with intent to rob, ought not to be joined in the same indictment. If they are joined, the prosecutor must elect on which the case is to go to the jury.

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 {
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Bere for the prosecution suggested, that this was similar to those cases where a count for forgery is joined with a count for uttering.

PARK J. There the punishment is the same under each count. It was the practice at the *Old Bailey*, after the statute passed for rendering the possession of forged instruments a transportable offence, to join a count for the forgery with a count upon the statute. The recorder first objected to this, and took the opinion of the twelve Judges on the subject, who were of opinion that such a joinder was irregular.

Bere then suggested, that a count for compound larceny might be joined with a simple larceny, although the punishment for the offences in the two counts was different. (*a*)

(*a*) The punishment in each case used to be death. In some cases the law gave the benefit of clergy, but in all the degree of the offence is felony alike, and the punishment originally the same. Before the statutes 3 W. c. 9. & 5 Ann. c. 6. the same punishment would have been inflicted, except in the case of persons qualified for admission into orders, and of course the joinder would have been good. The statutes, in mitigating the punishment, did not alter the offence, or the judgment which the law affixed, and therefore not the propriety of the joinder; they merely allowed generally, in certain cases, a privilege which was originally personal. Recent criminal statutes indeed affix a statutable punishment less than death to many sorts of felony: thus, in the principal case under the stat. 7 & 8 Geo. 4. c. 29. s. 6., the sentence under the first count of the indictment would be death; under the second, it would be transportation for life, or such other punishment as thereby directed. The crime however being the same, the mere difference of punishment appears not to vitiate the joinder. It was so held on the

So also, when a conviction for simple larceny takes place on a count for compound larceny, it must be on the principle, that the count for the greater offence contains in substance a count for the *lesser* offence; and a conviction for the lesser offence proceeds on the principle, that the other matters may be rejected as immaterial. Whatever the strict rule of law is, it certainly is always in the power of the Judge to call on the counsel to elect, if in his discretion he thinks that course best calculated to promote the interests of justice.

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PARK J. said, that in a late case, where, from the circumstances, it was doubtful whether the prisoner was a principal or accessory, he had refused to allow him to be tried on an indictment, charging him as principal and accessory. And general directions have been given to the clerks of assize, not to include both charges in the same indictment. *Galloway's* case, R. & M. C. C. R. 234. His Lordship was of opinion that in the present case the counsel for the prosecution ought to elect. (*a*)

same statute, s. 15. & 54. in *Galloway's* case, R. & M. C. C. R. 234., where the punishment on the two counts was different, though it was death in neither.

(*a*) The object of calling on the counsel for the prosecution to elect seems to be, that the prisoner may not have his attention divided among different *facts*; the object of making several counts is to take the chance of making that charge which the evidence will exactly support; and these counts being before the jury, they ought to find a verdict on every one of them which is proved, whether the counsel for the prosecution know which that is or not.

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 {
 REX
 v.
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Bere elected to proceed on the count for the robbery, upon which the prisoners were all convicted.

Bere for the prosecution.

No counsel appeared for the prisoners.

If the counts are improperly joined, that is ground of error or for quashing the indictment, not for election.

It would seem, from these considerations, that the principal case was not one in which the counsel for the prosecution ought to have been called upon to elect. On the other hand, it is to be observed that in *Galloway's* case, R. & M. C. C. R. 234., cited by Park J., the Judges, who all considered that the charges in that indictment, which charged the prisoners in one count as principals and in another as receivers, might legally be joined, were equally divided on the question whether the prosecutor ought to have been put to his election ; and therefore they all agreed that the directions above mentioned should be given to the clerks of assize. The principal case however goes a good deal farther. In *Galloway's* case, the course of proof required to support or rebut the two charges would be necessarily different : it would relate to different times and circumstances : in the principal case, it would only refer, under either aspect, to what took place on one occasion ; and the case seems therefore to bear a very close analogy to the common cases referred to by the counsel for the prosecution.

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TAUNTON.
Coram PARK J.

REX v. SEARLE.

TAUNTON,
March 31.

THE prisoner was indicted under 9 G. 4. c. 31., for cutting and maiming *Eliza Searle*, with intent to murder, maim, and do some grievous bodily harm.

When a prisoner's defence is insanity, a medical man, who has heard the trial, may be asked whether the facts proved show symptoms of insanity.

The fact of cutting was clearly proved, and the case for the prosecution disclosed facts and symptoms of insanity arising from religious fanaticism; and it was shewn that the prisoner had always exhibited the greatest affection for *Eliza Searle*, who was his daughter, until recently before the act, when he had taken up the opinion that he was ordered by the Holy Ghost to shed human blood as the only means of his salvation. It was proposed to call a physician, who had heard the whole evidence, to give his opinion as to the insanity of the prisoner.

PARK J. doubted whether this could be legally done; but after referring to *Rex v. Wright*, R. & R. C. C. R. 456., allowed the physician to be asked whether the facts and appearances proved, shewed symptoms of insanity.

The prisoner was acquitted on the ground of insanity at the time of the act.

Jeremy for the prosecution.

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 CHESTER.

 Coram TINDAL C. J.

 CHESTER,
 March 29.

 NIXON and Another, Assignees of EDGE, a
 Bankrupt, v. MAYOH.

An attorney who receives a deed from his client, and is compelled to produce it by commissioners of bankrupt, and afterwards receives it back from them under an undertaking to produce it again if required, may nevertheless refuse to produce it in an action brought by the assignees of the bankrupt under whose commission he was compelled to produce it.

ASSUMPSIT for money had and received to the use of the plaintiffs, as assignees.

Notice had been given to dispute the petitioning creditor's debt and act of bankruptcy.

The act of bankruptcy relied on was a deed of assignment made by the bankrupt to the defendant. The defendant had delivered this deed to *Boothroyd*, his attorney, who had attended the defendant with the deed before the commissioners of bankrupt, and they had required him to produce it. He objected to do so, as having received it professionally from his client, but the commissioners required him to produce it, and he did so under protest. He then received it back from the commissioners, on an undertaking to produce it, or give a copy of it, when required afterwards.

Boothroyd had been served with a *subpœna duces tecum* to produce this deed, and now had it in Court, but objected to produce it, on the ground that he had received it professionally from his client, and still held it in that capacity; that the production before the commissioners was under compulsion, and could not alter the character in which he held the deed, when re-delivered to him;

and that the undertaking to produce, or give a copy, could not make any difference, having been only the terms on which he obtained it back after it had been improperly obtained from him.


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NIXON and
ANOTHER
v.
MAYOH.

Temple and *Dr. Brown* contended that he was bound to produce the deed. He holds the deed now as the agent of the commissioners, who delivered it to him. They would have been entitled to impound the deed: as they had not done so, but had delivered it back to *Boothroyd* on certain terms, he holds it for them, and has no privilege with respect to producing it.

J. Jervis for the defendant. The commissioners were not entitled to compel the production of the deed by *Boothroyd* at all (*a*); their mode of procedure should have been against *Mayoh* himself, whom they might have examined. They had therefore no right to impound the deed, or to make any terms as to its re-delivery; and *Boothroyd* never having acceded to those terms, but always protested against them, is entitled, now that he is again in possession of the deed, to all the privileges with which he originally held it.

TINDAL C. J. held that the production of the deed had originally been improperly obtained from the witness by the commissioners, and that he was therefore now entitled to refuse to produce it.

(*a*) See *Harris v. Hill*, 3 Stark. 140. *Roscoe on Evidence*, p. 64.

1831.

NIXON and
ANOTHER
v.
MAYOR.

Notice to produce the deed was then proved,
and the contents of the deed shown by secondary
evidence.

Verdict for the plaintiffs.

Temple and *Dr. Brown* for the plaintiffs.

J. Jervis and *Lloyd* for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

EASTER TERM,

1 W. IV. 1831.

SITTINGS AFTER TERM IN LONDON.

THACKER and Others v. MOATES.

1831.

GUILDHALL,
May 11.

ASSUMPSIT for money lent, money paid, &c.

The plaintiffs were merchants at *Calcutta*, and had advanced money to *Wilkinson*, the master of a ship belonging to the defendant, while the ship was at *Calcutta*. There was no dispute but that this money, or the greater part of it, had been properly applied by *Wilkinson* to the purposes of the ship, but there was no distinct evidence whether it was borrowed for these purposes expressly, or borrowed generally by *Wilkinson*, and afterwards so applied by him. The action was brought against the defendant, as owner of the ship, to recover this money.

The owner of a ship is not liable for money advanced to the master, and expended by him in the necessary use of the ship, unless the money is advanced *expressly* for that purpose.

1831.
 THACKER
 and OTHERS
 v.
 MOATES.

LORD TENTERDEN C. J., in summing up to the jury, said, There is no doubt that this money was properly applied to the purposes of the ship ; but the question for the jury is, whether it was *borrowed* for those purposes. The owner of a ship is liable to the master for what he actually lays out for the benefit of the ship ; but he is not liable to a stranger for money advanced, unless advanced expressly for that purpose. The master has no power to bind them except in that case. Was then the money advanced generally to the master, and afterwards applied by him for the necessary service of the ship ? or was it borrowed by him expressly for the purpose of that application ? In the latter case the verdict must be for the plaintiffs ; in the former, for the defendant.

Verdict for the plaintiffs. (a)

Campbell and Maule for the plaintiffs.

Sir J. Scarlett for the defendant.

(a) *Rocher v. Busher*, 1 Stark. 27. *Palmer v. Gooch*, 2 Stark. 428.

1831.

SITTINGS AFTER TERM AT WESTMINSTER.

MONK *v.* WHITTENBURY.WESTMINSTER,
May 12.

TROVER.

The action was brought to recover the value of thirty-five sacks of flour sent by the plaintiff to the wharf of one *Cramp*, and sold by *Cramp* to the defendant.

The flour was sent to *Cramp's* wharf, with directions to keep it till further orders; and it did not appear that any such orders had been given: on the contrary, there was some evidence to shew that they had not, and it did not appear that *Cramp* had had flour of the plaintiff before. *Cramp* was a wharfinger, and was also a flour-factor in considerable business; and he sold the flour in question to the defendant, and received immediate payment; but absconded, without paying over the money to the plaintiff. There was some evidence to shew that the sale was made at an under price; but on this point the evidence was conflicting. It also appeared that at the time the payment was made, there was not any order given for the delivery of the flour. There was also evidence that the sale was not a common sale on the Corn-market, but that the contract was made subject to the approbation of some person who was to be consulted.

A wharfinger, who is also a flour factor, having flour sent to him to keep till further orders, is not an "agent intrusted with" the flour, within the 6 G. 4. c. 94. s. 4., so as to give validity to a sale by him of the flour.

1831.
MONK
v.
WHITTEN-
BURY.

On this state of facts it was contended on the part of the plaintiff, that the defendant acquired no property in the goods at common law, *Cramp* having no power of selling them, but being a mere depositary to keep them until farther orders ; and that the sale was not made valid under stat. 6 G. 4. c. 94. s. 4., *Cramp* not being an agent intrusted with the goods, within the meaning of that section : and, even if he were so to be considered, the sale did not take place in the usual and ordinary course of business. It was also contended, that the sale was at such an under price as to furnish evidence of fraud on the part of the defendant.

Sir *James Scarlett* for the defendant, besides arguing that, on the whole effect of the evidence, *Cramp* could not be taken to have exceeded his authority, and therefore that the sale was valid at common law, contended that at all events it was protected by the stat. 6 G. 4. c. 94. By the second section of that statute, any person intrusted with the possession of any bill of lading, *India* warrant, &c. shall be deemed to be the true owner of the goods described therein, so as to give validity to any contract entered into by him for the sale of those goods. The possession of a bill of lading is a less convincing evidence of the control over the goods than the possession of the goods themselves : *a fortiori* therefore, if the holder of the bill of lading has this power, the holder of the goods must have it.

Lord TENTERDEN C. J. There might perhaps be a question, whether such an inference might not

be drawn from the second section, if it had stood alone. But here there are sections expressly providing for the case of the possession of goods. Nothing therefore is left to inference; but the defendant must bring his case within the words of those sections.

1831.
 MONK
 v.
 WHITTEN-
 BURY.

Sir James Scarlett. Then the defendant is an agent intrusted with goods, within the meaning of the fourth section. To avoid this conclusion, it is contended that the sale was not made in the ordinary course of business, and that it was fraudulent. The evidence however bears out neither position. He then addressed the jury on the effect of the evidence.

Lord TENTERDEN C. J., in summing up to the jury, after observing that there was no evidence to shew that *Cramp* was authorized to sell the flour for the plaintiff, and consequently that the defence, if any, was not at common law, but under the 6 G. 4. c. 94., said, that two questions arose on that statute: one, whether *Cramp* was an "agent" within the meaning of the fourth section, which was a matter of law; the other, whether, assuming him to be so, the contract was in the usual and ordinary course of business. The jury will have to determine this question of fact, and if they are of opinion that the sale was not in the usual course of business, the verdict will at all events be for the plaintiff; if they think that it was so, I will then give my opinion, in point of law, how the verdict ought to be entered on that finding.

1831.
MONK
v.
WHITTEN-
BURY.


His Lordship then summed up the evidence on this question of fact, and the jury continued for a considerable time in deliberation.

Lord TENTERDEN C. J. addressed the counsel in the cause, and proposed to relieve the jury from finding a verdict on the fact; saying, that he was of opinion, even if they should find that the sale was in the usual course of business, that *Cramp* was not an agent within the meaning of the fourth section, and that the plaintiff therefore was at all events entitled to a verdict. He proposed therefore to direct a verdict for the plaintiff on the point of law, and that the defendant should be at liberty to move on the direction.

Campbell for the plaintiff however desired to have the opinion of the jury on the question of fact; and they finally found a verdict for the plaintiff, on the ground that the sale was not in the ordinary course of business.

Campbell and *Thesiger* for the plaintiff.

Sir J. Scarlett and *F. Pollock* for the defendant.

1831.


ADJOURNED SITTINGS AFTER TERM IN LONDON.

RAYNAL, Gent., One &c., v. SMITH, Gent.,
One, &c.

May 16.

THIS was an action on an attorney's bill for business done in the Lord Mayor's Court. The defendant was not the party in the suit in which the business was done, but only his general attorney, and as such had employed the plaintiff, who was an attorney of the Lord Mayor's Court. No bill had been delivered. It was objected that the plaintiff ought to have delivered a bill under 3 Jac. 1. c. 7. s. 1., and *Heming v. Wilton*, 1 M. & M. 529., was cited.

The 3 Jac. 1. c. 7. s. 1. is confined to business done in the superior courts at Westminster.

LORD TENTERDEN C. J. thought that the statute only applied to cases where the attorney was the original party, and not where, as here, he was the agent of another person(*a*); but gave the plaintiff leave to move to enter a nonsuit.

In the following *Trinity* term, *Follett* moved accordingly for a rule to enter a nonsuit, and contended, first, that this was different from the case of an agency bill in the same court, of which both parties are attorneys. Here the defendant was not

(a) See *Sandys and Another v. Hornby*, Gent., *suprà*, 33.

1831.

RAYNAL

v.

SMITH.

an attorney of the Lord Mayor's Court, and was obliged to employ another, and did this on his own credit; and was therefore the "master or client" within the terms of the act.

PARKE J. Does the statute of *James* apply to courts of inferior jurisdiction? *Brickwood v. Fanshaw*, Carth. 147.

Follett. The statute has two clauses totally distinct; the first relates to the mode of practice in the superior courts. The other is general; and in terms applies to all courts. The statute ought to be construed largely to furnish the most extensive protection to clients. The plaintiff is an attorney of this court; and the same construction ought to be put on this statute as is put on the 2 G. 2. c. 23. s. 23. In *Smith v. Wattleworth*, 4 B. & C. 364., the Court held that business done in the Court of Insolvent Debtors was within that statute.

LORD TENTERDEN C. J. I am of opinion that the 3 Jac. 1. c. 7. s. 1. does not apply to business done by an attorney of the Lord Mayor's Court, who may happen to be an attorney of the superior courts, but that the whole of that statute applies to business done in the courts at *Westminster*. By that statute "No attorney, solicitor, or servant to any, shall be allowed from his client or master for any fee given to any serjeant or counsellor, or for any sums of money given for copies to any officers in any court of record at *Westminster*, unless he have a ticket subscribed with their hands

and names, testifying how much hath been received or paid, and at what time; and all attorneys and solicitors shall give a true bill to their masters, or clients, or their assigns, of all other charges concerning the suits which they have for them, subscribed with their own hands and names, before they shall charge their clients with any the same fees or charges." It is admitted that the first part is confined to the superior courts, but it is contended that the latter part is general. Now I see nothing in the second part to carry it beyond the first; the same persons are described in both parts, both to receive payments and to make charges, and the word "suits" in the second refers to suits carried on by the same persons as in the first, and the persons there spoken of are persons carrying on suits in the superior courts. Both must therefore be construed together as applying to the superior courts only.

1831.

RAYNAL

v.

SMITH.

LITTLEDALE J. I am of the same opinion, that the statute is confined to the superior courts at *Westminster*. The first section applies to particular charges, of which it is competent to get memoranda. The second extends to all charges; but the same persons and the same courts are contemplated in both.

PARKE J. and TAUNTON J. concurred.

Rule refused.

1831.

SITTINGS AFTER TERM IN LONDON
IN THE EXCHEQUER.

GUILDHALL,
May 13.

WILLIAMSON v. INNES.

A homeward policy on freight at and from A., attaches when the ship is at A. in a condition to begin to take in her homeward cargo.

ASSUMPSIT on a policy of assurance on freight by the ship *Gowan*, at and from *Algoa Bay* and *Table Bay*, both or either, to *London*.

The declaration stated, that before the voyage the ship had been chartered on a voyage from *London* to *Table Bay* and *Algoa Bay*, and back, at certain outward and homeward rates of freight therein mentioned; that she had arrived and was in good safety at *Algoa Bay*, and that a homeward cargo was ready for her under the charter; and that before it was put on board she was lost by perils of the sea. Plea, the general issue.

At the trial, the policy and charterparty were admitted. The captain of the ship was called as a witness for the plaintiff, and stated, that he had arrived with an outward cargo at *Table Bay*, and discharged such part of it as was destined for that place, and had taken up about sixty tons of goods for *Algoa Bay*, where he arrived on the 30th of *September*, and came to an anchor: from that time till the 8th of *October* he was engaged in discharging his outward cargo when the weather would permit; he further stated that, on the evening of the 8th of *October*, he gave orders that no more of the outward cargo should be discharged till some of the homeward cargo should be on board, as her load was reduced to about 70 tons, which, in his

judgment, was requisite for the safety of the ship (which was of 144 tons register) in the situation in which she was placed; and that he intended to take on board part of the homeward cargo which was ready for him, consisting of hides, the next morning. Before that time however a storm arose, and the ship was lost. For the defendant it was admitted, that the right to freight had attached, and that the loss was as stated by the captain: but it was contended that in fact the vessel was not, at the time of the loss, in a state to begin to take in her homeward cargo, and consequently that the voyage "at and from *Algoa Bay*" had not commenced; that this would only begin when the unlading of so much of her outward cargo as was not requisite to be kept on board for the safety of the ship was finished. Several captains of merchant vessels were called for the defendant, who stated that in their judgment 30 tons were quite sufficient to keep in the ship for her safety in the place in question, and that she could not be ready to take in any of her homeward cargo with 70 tons of her outward cargo on board.

1831.
WILLIAMSON
v.
INNES.

Lord LYNTHURST C. B. told the jury, that the question for them was merely one of fact: that if the ship was in a condition to begin to take in her homeward cargo, the plaintiff was entitled to recover; if not, the verdict ought to be for the defendant.

Verdict for the plaintiff.

F. Pollock and *Cresswell* for the plaintiff.

Campbell and *Maulc* for the defendant.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN K. B.

AT THE SITTINGS IN AND AFTER

TRINITY TERM,

1 W. IV. 1831.

FIRST SITTINGS IN TRINITY TERM.

1831.

WESTMINSTER,
May 27.

DUFAUR, Executor &c. of DUFAUR, v.
OXENDEN.

An unsigned acceptance, written on the face of a bill of exchange, is not made invalid by stat. 1 & 2 G. 4. c. 78. § 2.; but it is a question for the jury whether it was intended to operate in its present form, or to be subsequently completed by signature.

ASSUMPSIT by the executor of the payee of a bill against the acceptor.

The bill was drawn by *Dufaur*, payable to his own order, and addressed to the defendant, who wrote across it, "Accepted: payable at Messrs. *Stevens* and Co," without any signature.

F. Pollock for the defendant objected that this was no acceptance, for want of a signature.

Gurney for the plaintiff referred to an anonymous case in Comb. 401., as shewing that the acceptance was sufficient; and said that the same

doctrine was adopted in Bayley on Bills, 141. 4th ed. (a)

1831.
 DUFUR
 v.
 OXENDEN.

F. Pollock. At that time a parol acceptance was sufficient, and it was held that any circumstances, from which it might be inferred that the drawer intended to pay the bill, amounted to an acceptance. But the law is altered by the stat. 1 & 2 G. 4. c. 78. s. 2., which requires the acceptance to be in writing on the face of the bill; and there arises therefore a question of law, whether this unsigned writing can now amount to an acceptance. That question, if it becomes material, may be reserved for the opinion of the Court; but there is also a question of fact, whether, even if such an acceptance may by law be good, this must not be considered as merely an unfinished instrument, put into a condition to be completed by mere signature whenever the party pleased, but not meant to operate till then.

PATTESON J. in summing up to the jury said, that he was of opinion that the writing might be valid in law as an acceptance, notwithstanding the want of signature, but that it was a question for the jury whether it was intended to operate as an acceptance in its present state. It is very improbable that it was not so intended; for why did the defendant part with the possession of it if it were to be treated as incomplete, and brought back to him for signature before it was to have any validity? That however is a question for the

(a) See also Chitty on Bills, 173, 174. 6th edit.

1831.
DUFABUR
v.
OXENDEN.

jury, and they will find for the plaintiff or the defendant on the counts on the bill of exchange according to their opinion of it. The plaintiff is at all events entitled, on other evidence in the cause, to a verdict for the greater part of the sum, on the common counts.

Verdict for the plaintiff on the bill.

Gurney and Steer for the plaintiff.

F. Pollock and Platt for the defendant.

In the case cited from Comberbach, the acceptance, such as it was, was written on the bill, and held sufficient; and there were no other circumstances from which to infer an acceptance. The case therefore is an authority to shew that this was by itself an acceptance before the statute; and if so, being upon the face of the bill, it would continue to be such after it. And thus, in Bayley on Bills, 4th edition, published after the stat. 1 & 2 G. 4. c. 78., it is treated as *prima facie* a complete acceptance. In the principal case there was some evidence to shew money dealings between the plaintiff and defendant, of such a character that it was sought to be inferred that there was no consideration for the acceptance; and thence, besides relying on that as a defence, it was argued that it was improbable that it should have been intended to operate in its present form. There was however no direct evidence that it was not so intended, and the evidence given failed to prove any want of consideration. It may therefore be doubted whether any case has gone so far as the present, in leaving the completeness of the acceptance as a question of fact to the jury, instead of directing them that, in the absence of evidence to the contrary, it must be taken to be a complete acceptance.

1831.

SITTINGS AFTER TERM IN LONDON.

FISHER *v.* DAVIES.GUILDHALL,
June 15.

DEBT for use and occupation, with the usual money counts. Plea, *nil debet*, with notice of set off.

The Court will not certify under stat. 1 W. 4. c. 7. s. 2. that execution ought to issue immediately in an action of debt on simple contract.

The cause was referred; but *Campbell* for the plaintiff wished it to be one of the conditions of the reference, that the arbitrator should have the power of directing judgment to be entered as of *Trinity* term.

F. Pollock for the defendant objected to this, the defendant not being entitled to judgment of the term, if the cause were tried in Court.

Campbell admitted this was the case, but said, that upon the trial the Judge would have had the power of certifying under the stat. 1 W. 4. c. 7. s. 2. that execution ought to issue immediately, and that the authority proposed to be given to the arbitrator would, in substance, only give him the same power.

LORD TENTERDEN C. J. It is a power which I certainly should not have exercised. The plaintiff has chosen to declare in debt on simple contract :

1881.

FISHER

v.

DAVIES.

he has therefore made it necessary for the defendant to plead, and to defend the action; because otherwise the plaintiff would have had judgment for the whole sum claimed in his declaration, and would have taken out execution for such sum as he thought proper. Having thus himself made delay necessary, I certainly should not interfere now to give him a more rapid remedy than he would otherwise be entitled to.

The cause was then referred, without the proposed clause in the order of reference.

Campbell and *R. V. Richards* for the plaintiff.

F. Pollock for the defendant.

ADJOURNED SITTINGS AFTER TERM
AT WESTMINSTER.

WESTMINSTER,
June 24.

The KING on the Prosecution of FANE, Esq., v.
ADEY, Gent., One, &c.

If a witness objects to answer questions, on the ground that they may subject him to criminal proceedings, the counsel on the opposite side cannot argue in support of the witness's objection.

CRIMINAL information for publishing several libels.

A witness on the part of the prosecution objected to answer a question, on the ground that he had been threatened with prosecution in respect of the publication in question. The Attorney General, who appeared as counsel for the defendant, rose to support the objection.

Lord TENTERDEN C. J. refused to hear him, saying that the objection belonged to the witness only.

The counsel for the prosecution however argued that the witness was compellable to answer, and Lord *Tenterden* then allowed the Attorney General to support the witness's objection, and Sir *James Scarlett* was heard in reply.

1831.
 The KING
 v.
 ADEY.

LORD TENTERDEN C. J. I think I am wrong in having allowed the Attorney General to argue the point at all. It struck me at the time, that having heard argument on one side, I ought to hear it on the other also. But the privilege is that of the witness, not of the party; and I think, therefore that counsel have no right to interfere for the purpose of excluding an examination, to which, as against their client, there is no objection.

On further enquiry it appeared that the witness, although he had been threatened with a prosecution, did not apprehend that the effect of his answering the question would be to endanger him, and he was directed to answer it.

Guilty of publishing one libel only.

Sir *J. Scarlett Gurney* and *Manning* for the prosecution.

Denman A. G. *C. F. Williams* and *Follett* for the defendant.

See *Thomas v. Newton*, 1 M. & M. 48. n., where a similar rule was adopted. In that case, however, the counsel suggested the objection, and did not merely propose to support it when taken by the witness.

1831.

WESTMINSTER,
June 25.

WHARTON v. KING.

An *action* may be maintained on an award made under a submission by a Judge's order, the parties having attended at the reference.

ASSUMPSIT for nonpayment of money pursuant to an award.

The reference was made by a Judge's order. The defendant had attended at the first meeting before the arbitrator, but an objection was made to his continuing in the room, on the ground that the plaintiff was not there, and he therefore retired, and did not attend again.

E. Lawes Serjt. for the defendant contended that no action could be maintained in this case, the submission having been by a Judge's order; but that the only mode of enforcing it was by making the order a rule of court and proceeding by attachment. This appears to have been the opinion of the Court in *Biddell v. Dowse*, 6 B. & C. 255., where the decision indeed proceeded on the ground, that some of the parties sought to be bound by the Vice-Chancellor's order were infants, and that no contract on their part could be implied: but *Abbott* C. J., in delivering the opinion of the Court, expressly guarded against any inference that the consent of the attorneys would be binding even upon adult parties.

Lord TENTERDEN C. J. Under the circumstances of this case I think the objection made does not at all arise. The attendance of the defendant before the arbitrator at the first meeting, shewed

that he recognized the act of his attorney in referring, and is therefore evidence of an actual consent to the reference.

Verdict for the plaintiff.

Miller and *S. Temple* for the plaintiff.

E. Lawes Serjt. for the defendant.

1831.
WHARTON
v.
KING.

So in *Matson v. Trower*, R. & M. N. P. C. 17., an award was held good, though it was made by an umpire, and the arbitrators had no authority to appoint one; the parties having attended him without objection.

In *Filmer v. Delber*, 3 Taunt. 486., the Court refused to set aside an order of reference made with the consent of counsel and attorney on an affidavit that the attorney had been forbidden to refer, the Court saying that the defendant's remedy was by action against the attorney. In *Still v. Halford*, 4 Campb. 17., an action was brought on an award made under a Judge's order, and no objection made to it; but the plaintiff was nonsuited on another ground.

ADJOURNED SITTINGS AFTER TERM IN LONDON.

LAWRENCE v. MILLER.

GUILDHALL,
June 29.

ASSUMPSIT by the assignee of an insolvent debtor.

The assignment to the plaintiff was not executed by the provisional assignee till after the action was brought, and the declaration filed.

Comyn for the defendant objected that the action could not be maintained. The property of the bankrupt is certainly vested in the assignees by relation; but still, to maintain a particular

The assignee of an insolvent debtor cannot recover in an action commenced by him as assignee before the assignment executed to him, though it is executed before the trial, but not before the declaration.

1831.
┌
LAWRENCE
v.
MILLER.

action, he must have been assignee at the time of commencing it. Not having been so, it ought to have been brought in the name of the provisional assignee.

Campbell for the plaintiff. The stat. 7 G. 4. c. 57. s. 19. directs, that “ after the conveyance and assignment by the provisional assignee, all the estate and effects of the prisoner shall be to all intents and purposes as effectually and legally vested by relation in the assignee or assignees, as if the said conveyance and assignment had been made by such prisoner to him or them.” As soon therefore as the assignment is made, the assignee is substituted for the provisional assignee *ab initio*, and the provisional assignee may from that time forward be left altogether out of consideration, and the permanent assignee considered to have been in from the first.

PATTESON J. The act certainly gives the assignee the property by relation ; but that cannot give validity to any action brought by him before he had that character. He states by his declaration that the defendant is indebted to him as assignee : at the time of filing it that was not the case, for he was not then entitled. The proper plaintiff at that time would have been the provisional assignee.

Nonsuit.

Campbell and *Heaton* for the plaintiff.
Comyn and *Ball* for the defendant.

See *Page v. Bauer*, 4 B. & A. 345.

1831.

WELLS v. FISHER.

GUILDHALL,
July 1.*Assumpsit* for work and labour.

A witness produced for the defendant, to prove that the plaintiff had lived rent free in a house of the defendant's, and gave his services without expecting remuneration, had lived with the plaintiff as his wife during the time to which she was called to speak ; but her former husband, who had been absent for thirty years, and was supposed dead, returned to *England* afterwards, and she thereupon ceased to live with the plaintiff.

A woman who was married to a man, but whose marriage to him is void by reason of her having a former husband living, who had been supposed dead, may be examined against him to prove his declarations made while she lived with him as his wife.

F. Pollock for the plaintiff objected that the witness could not be examined as to any knowledge which she had gained from conversations with the plaintiff while she lived with him as his wife.

PATTESON J. I see no objection to it. There never was any valid contract of marriage between them ; and the connection, such as it was, being dissolved, there is now no bias upon her mind.

Verdict for the defendant.

F. Pollock and *R. V. Richards* for the plaintiff.

Sir J. Scarlett and *Wallinger* for the defendant.

When there has been a valid contract of marriage, no evidence can be received from either of the parties of declarations made by the other during the marriage, though it may have been dissolved by death, *Doker v. Hasler*, R. & M. N. P. C. 198.

1831.



or by divorce for adultery, *Munroe v. Twisleton*, Peake on Evidence, Appendix 44. The ground of the rule generally is not the danger of bias, but the protection of confidence between man and wife. This protection however is not extended to a mere marriage *de facto*, Stark. on Ev. Part IV. p. 711., and Lord Hale, Pleas of the Crown, 693., says that a marriage void for bigamy is not even a marriage *de facto*. Still, while the cohabitation under such marriage was subsisting, the probability of bias might seem an objection to the examination: and accordingly it was formerly doubted whether a woman not married to a man, but living with him as his wife, is a competent witness for him, *Campbell v. Twemlow*, 1 Price 81. It was however decided in *Batthews v. Galindo*, 4 Bing. 610., that such a witness was admissible; and the same law seems to follow as a necessary consequence from the decision in *Adey's case*, Leach's C.C. 248., in which the evidence of such witness was received *against* the reputed husband: for in all cases in which they are admissible against each other, they are also admissible for each other. *R. v. Serjeant*, R. & M. N.P.C. 352.

GUILDHALL,
July 2.

CRUICKSHANKS v. ROSE.

A party to whom two sums are due, the one for spirituous liquors supplied in quantities not amounting to 20s. at a time, the other for board and lodging, may apply payments, made generally, to the account for spirituous liquors.

ASSUMPSIT by the payee against the maker of two promissory notes, one for 10*l.* and the other for 10*l.* 7*s.* 6*d.*

The plaintiff had supplied the defendant with board and lodging, and also with spirituous liquors in quantities not amounting to 20*s.* at a time. The whole amount exceeded the sum for which the bills were given; but payments had been made from time to time, reducing the whole balance to the amount of the two bills. The plaintiff claimed to apply these payments, which had not been specifically appropriated at the time, to the items for spirituous liquors; and if they were so applied,

the sum remaining due for spirituous liquors would be about 7*l.*, and the sum due for board and lodging about 13*l.*; if they were applied to the other part of the account, the sum due for spirituous liquors would exceed the amount of either of the bills taken by itself. The defendant contended that the payments should be applied to the board and lodging account, and then both the bills, being wholly or in part for spirituous liquors, would be void.

1831.

CRUICK-
SHANKSv.
ROSE.

LORD TENTERDEN C. J. held, that the plaintiff might apply the payments to the account for spirituous liquors, there being nothing in the statute 24 G. 2. c. 40. s. 12. to enable a party paying for them at the time to recover back the payments so made, but the statute only preventing the seller from maintaining any action for the price. The amount due for spirituous liquors therefore being reduced below 10*l.*, and this sum being entirely covered by one of the bills, his Lordship held that one of the bills declared upon might be considered as given for the board and lodging account only, and that the plaintiff might recover upon that; the other, having part of its consideration the supply of spirituous liquors, must be considered as void, as in *Scott v. Gillmore*, 3 Taunt. 226. (a)

Verdict for the plaintiff accordingly.

Talfourd for the plaintiff.

Campbell for the defendant.

(a) See *Spencer v. Smith*, 3 Campb. 9.

1831.

GUILDHALL,
July 4.BROCKLEBANK *v.* SUGRUE.

On a policy
on freight,
the ship having
actually earned
full freight,
though not
that intended
for her, the
owners cannot
recover for
the delay and
expense as a
partial loss.

ASSUMPSIT upon two policies of insurance, one on the ship *Hebe*, the other on the freight of the same ship.

The plaintiff sought to recover for a partial loss by perils of the sea.

The terms of the policy upon freight are stated in the report of the case on a former trial in 1 B. & Ad. 81. The vessel having suffered material injury in her outward voyage, and being therefore much delayed before she could take in the cargo prepared for her at *St. John's, New Brunswick*, that cargo was sent home by another vessel. The *Hebe* however finally returned to *England*, and earned full freight by conveying other goods.

F. Pollock in opening the case for the plaintiff said, that there was certainly considerable difficulty in sustaining the claim on the policy on freight under these circumstances, since in *Mordy v. Jones*, 4 B. & C. 394., where a vessel had been obliged to unload part of her cargo, under circumstances which made it undesirable to reload it, yet it was held that there could be no recovery on the policy for freight; and the principle adopted seemed to be, that if the ship remained capable of carrying the goods, and the goods capable of being carried, the delay and expense, though they might be a reason for refusing to carry them, would not enable the insured to recover against the un-

rwriters on freight. According to that doctrine, it would seem that there can be no partial loss of freight. There may indeed be a total loss of part of the freight, where part of the cargo actually perishes, but there can be no partial loss of the whole. That question however is now for decision.

1831.
BROCKLEBANK
v.
SUGRUE.

Sir *J. Scarlett* and *Campbell* for the defendant. *Mordy v. Jones* was a much more favourable case for the insured than the present one. In that case part of the freight was actually lost, but not being necessarily so, the underwriter was held not to be liable under the circumstances. Here there is finally no loss whatever, for the ship actually brought home a full cargo, and earned the whole freight.

Lord TENTERDEN C. J. I am clearly of opinion that there can be no partial loss under these circumstances.

It was then suggested that there had been a small *average* loss, and it being admitted that there was a partial loss on the policy on the ship, the cause was referred.

F. Pollock and *Manning* for the plaintiff.

Sir *J. Scarlett* and *Campbell* for the defendant.

1831.

GUILDHALL,
July 5.NASH *v.* DUNCOMB and GRIFFIN.

An unstamped agreement is admissible in evidence between the parties to it for the purpose of proving usury.

ASSUMPSIT on a promissory note for 500*l.*

It was shewn that the plaintiff had lent the defendants 500*l.*, and had taken the promissory note in question as a security. The note was sent to the plaintiff, enclosed in the following letter:—


Memorandum. This 5th day of *September* 1826, the enclosed note for 500*l.* and interest is given for so much money lent this day to us by Mr. *Nash*, who has sold out of the 4 per cents. at 94 $\frac{3}{8}$ for our accommodation. We do therefore undertake, in addition to the liquidation of the said note, to make good to Mr. *Nash* any loss he may sustain by the difference of the price of stocks, when the said note shall be liquidated.

Griffin and Duncomb.

The defence was that the loan was usurious, under the authority of *White v. Wright*, 3 B. & C. 273.; and on *F. Pollock* for the defendant *Duncomb* calling for the agreement, it was produced by Sir *J. Scarlett*, who appeared for the plaintiff, but objected to by him as inadmissible for want of a stamp.

F. Pollock contended that the stamp acts did not apply to such a case as this, the agreement being illegal and void. Those acts are not intended to favour crime, which would be the case if this objection prevailed; and in criminal cases

it has frequently been held that such instruments were admissible, though unstamped; here the plaintiff retained the instrument in his own possession and control, and could at any time have got it stamped and made available, if lawful.

1831.

 NASH
 v.
 DUNCOMB and
 ANOTHER.

Sir *J. Scarlett*. The proper distinction is between civil and criminal cases. In the latter a party cannot protect himself by his own omission of stamping. In civil cases, where parties go on their contract, the instrument is not admissible unless properly stamped.

Lord TENTERDEN C. J. I am disposed to think I ought to receive the document in evidence, subject to the objection.

Sir *J. Scarlett* then called the defendant *Griffin*, who had pleaded his bankruptcy, and a *nolle prosequi* had been entered as to him; and he stated that the letter and note were sent to the plaintiff after the money had been advanced on an agreement for the promissory note only, and that an indemnity against loss in selling out was no part of the agreement made by the plaintiff.

It was left to the jury to say whether the money was lent on the conditions of the memorandum, or on the note only, and they found their

Verdict for the plaintiff.

Sir *J. Scarlett* and *Platt* for the plaintiff.

F. Pollock and *Thesiger* for the defendant.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN C. P.

AT THE SITTINGS AFTER
TRINITY TERM,

1 W. IV. 1831.

ADJOURNED SITTINGS IN LONDON.

1831.

GUILDHALL,
June 27.

BATES and Another v. TODD.

A bill of lading is not conclusive between the shippers of the goods, and the owners of the ship; but the owners may show that less goods than specified in the bill of lading were shipped, the master, who signed the bill of lading, having been misled by the fraud of the agent of the shippers.

ASSUMPSIT against the owners of the ship *Thames*, on a bill of lading, signed by the master at *Sinapore*, for 890 bags of pepper, to be delivered to the plaintiffs at *London*.

The declaration alleged, that the plaintiffs had caused to be shipped 890 bags, and that 100 bags were, through the carelessness and negligence of the defendant, lost; and in another count the breach alleged was, the mere non-delivery of the 100 bags. It was proved that only 790 bags had been delivered, and freight for that amount charged and paid.

The defence was, that only 790 bags were in fact shipped, and that the captain had been induced to sign the bill of lading for 890 by the

fraud of an agent of the plaintiffs at *Sincapore*. And evidence was offered to prove this defence. The plaintiffs were the original owners of the goods which were shipped by their agent on their account.

1881.
BATES and
ANOTHER
v.
TODD.

Spankie Serjt. for the plaintiffs contended, that the bill of lading was conclusive, and estopped the defendant, who was owner of the ship.

TINDAL C. J. said, he was of opinion that, as between the original parties, the bill of lading is merely a receipt, liable to be opened by the evidence of the real facts; and left the question to the jury whether in fact 890 bags, or only 790 were shipped.

The jury found for the defendant that there were only 790 bags, and that the fraud had been committed by the agent of the plaintiffs.

Leave was given to the plaintiffs to move to enter a verdict for the value of the 100 bags; but no application was made to the Court.

Spankie Serjt. and *Dodd* for the plaintiffs.

Wilde Serjt. and *Hoggins* for the defendant.

1831.

GUILDHALL,
June 28.

CORBETT and Another v. BROWN.

A person misrepresenting the credit of another, though without any intention of defrauding the party to whom he makes the representation, is liable to make good damage occasioned by that party's giving credit in consequence to the subject of the representation.

But only to the whole extent of the loss in consequence of credit *reasonably* given on the representation.

CASE for a false representation.

The defendant's son, at the time that he began business, applied to the plaintiffs to be supplied with goods, told them that he had 300*l.* of his own property, and referred to his father in confirmation of his statement. The plaintiffs wrote to the defendant, mentioning the representation which had been made to them, and enquiring into its truth; and received an answer from him, "that the statement was perfectly correct, for that he had advanced him 300*l.*, being as much as he could spare." This was the representation, the falsehood of which was alleged. It was clear that the sum of 300*l.* had been advanced by the defendant to his son, but there was a doubt whether it had been intended as a gift, or merely as a loan; and evidence tending to each conclusion was offered.

As soon as the defendant's answer was received, goods to the amount of about 280*l.*, which had been previously ordered, were forwarded to the defendant's son; and the plaintiffs furnished him with other goods, amounting in all to about 1200*l.* in the course of about six months. At the end of this time he became bankrupt, and a balance of about 500*l.* remained due to the plaintiffs. A dividend of 8*s.* 8*d.* in the pound was received under the commission; but the defendant did not prove for the

300*l.* advanced by him, nor had he ever been paid any part of it.

1831.

*CORBETT and
ANOTHER
v.
BROWN.*

Jones Serjt. for the defendant contended that there was no evidence of fraud or intentional misrepresentation. Besides, there is no damage, for the goods would have been furnished just as certainly if the transaction had been accurately described, even assuming that it was not so : and this also shews an absence of any motive to misrepresent. Nor would there have been a better dividend on the estate, if the money had been actually given to the bankrupt, than there has been, even supposing it to have been only lent ; for the defendant has not made any claim for the 300*l.*, which, therefore, has been all divided among the creditors, as it would have been if the bankrupt's absolute property. These actions have been very frequent of late, and seem to be brought with the intention of converting an imperfect guarantee into a misrepresentation. They ought therefore to be treated on the same principles ; and, upon a guarantee, the defendant would not have been responsible, unless the contract clearly contemplated a continuing liability, for more than the parcel of goods supplied immediately on the faith of the representation ; and those have been paid for.

TINDAL C. J. The first question in this case is, whether the statement complained of was false within the defendant's knowledge ; and if it were false in fact, the falsehood could not, under the particular circumstances, fail to be known to the defendant. In that case, the defendant will be

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**CORBETT and
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liable in this action ; because, whether or no there were any motive or intention to defraud, the false assertion of a fact which he knew to be untrue, amounts to fraud in law, and all damages which fairly and necessarily follow from the misrepresentation may be recovered. In this respect it differs from the case of a guarantee, where the party makes himself responsible to a limited extent if his statement turns out to be incorrect, even though at the time he believed it to be true : here he is protected, unless he intentionally misleads ; and if he does so, he must make good the damage which naturally and fairly succeeds from his statement. It is immaterial to consider, whether the loss sustained has been increased by the falsehood of the statement : in this case it probably has not, for it does not appear that the 300*l.* has ever been repaid, and the dividend received by the plaintiff therefore has been as large as it would had the statement been true. But a party making such an application is entitled to receive a true answer ; and if he has been induced by a false one to give a credit, which otherwise he would not have given, he is entitled to recover all the injury which he has suffered without his own fault in consequence. In measuring those damages however, you must look to the conduct of the plaintiffs : if you think that they acted imprudently in trusting the defendant to so large an amount on such a representation as that made, they will not be entitled to damages to the whole extent of their loss. They had a certain measure of the situation of the party whom they trusted ; to the extent of loss occasioned by their trusting him to an amount which would be reason-

able under the circumstances represented, the defendant, if the representation be untrue, will be liable, though you should think that the credit so given might exceed the amount of the property represented : any loss occasioned by conduct in the plaintiffs, which would be imprudent on the assumption that the representation was true, is not a matter with which the defendant can be charged.

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 CORBETT and
 ANOTHER
 v.
 BROWN.

Verdict for the defendant.

Wilde Serjt. for the plaintiffs.

Jones Serjt. and *F. Kelly* for the defendant.

In *Michaelmas* term a rule nisi was obtained for a new trial, on the merits ; which was afterwards made absolute. (a)

(a) See 8 Bing. 33.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN THE COURT OF EXCHEQUER,

AT THE SITTINGS IN AND AFTER
TRINITY TERM,
1 W. IV. 1831.

FIRST SITTINGS IN TERM IN LONDON.

1831.

GUILDHALL,
May 31.

COLLINS *v.* BARROW.

A tenant of a house, who is bound by agreement to keep it in tenantable repair, may quit without notice in the course of his term, if the premises become unwholesome for want of sufficient drainage, if they cannot be kept dry without extravagant and unreasonable labour and expense on his part.

ASSUMPSIT for use and occupation.

The defendant took the house under a written agreement, by which he was to occupy it for three years, and to keep the premises in tenantable repair.

He had in fact quitted the premises without giving any notice at the expiration of the first six months; and the present action was brought to recover rent accruing after that time.

The defence was, that the house was unfit for occupation for want of sufficient drainage, whereby it became unwholesome, noisome, and offensive; and evidence was given to shew that it could not be kept perfectly dry without the construction of

a sewer, which the plaintiff, upon application to him, had promised to make, but it never had been made. On this evidence, and on the authority of *Edwards v. Etherington*, R. & M., N. P. C. 268., it was contended that the defendant was not liable to this action, having had no beneficial occupation.

On the part of the plaintiff evidence was given to shew that the premises might have been kept sufficiently dry by occasional pumping, without the construction of any sewer; and it was contended therefore that the inconvenience arose from the defendant's own neglect, and gave him no excuse for quitting. In *Edwards v. Etherington* there does not appear to have been any written agreement; here there was one, by which the defendant was to keep the premises in tenantable repair. He ought therefore to have used the reasonable means in his power to keep them dry; and if he had done so, no inconvenience would have arisen. Besides, the inconvenience shewn does not render the premises wholly unfit for habitation; and even on the principle of the case cited, the plaintiff must recover, unless the defendant had no beneficial occupation whatever. Thus in *Baker v. Holtpzaffell*, 4 Taunt. 45., an action for use and occupation was held to lie after the premises were burnt down, because the tenant still had the possession of the land.

BAYLEY B. I do not see that the fact of the tenancy in this case being under a written agreement is material. In any case, the tenant is bound to pay rent during the time for which he

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COLLINS

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BARROW.

has contracted, unless he satisfies the jury that, under the circumstances, he was justified in quitting. I think however that in point of law he will be freed from his obligation to reside on the premises, if he makes out, to the satisfaction of the jury, that the premises were noxious and unwholesome to reside in, and that this state arose from no default or neglect of his own, but from something over which he had no control, or none, except at an extravagant and unreasonable expense. Thus, he could not be bound to make a sewer; and if nothing else could keep the house wholesome, I think he was justified in quitting. The expense of making a sewer may be heavy; but if the plaintiff would not make it, he cannot, I think, call upon his tenant to continue in a house which requires it. There is evidence that occasional pumping would have been sufficient; if it would, the defendant ought to have continued to occupy, and must now pay; but if, as other witnesses represent it, pumping would only have succeeded by giving up an extravagant quantity of time to it, (one witness speaks of several hours a day,) I do not think the defendant was bound to do that. The verdict will turn on the question, whether the defendant neglected any thing which he was able and might reasonably be required to do.

Verdict for the plaintiff.

Bompas Serjt. and *Ball* for the plaintiff.

Hutchinson for the defendant.

SITTINGS AFTER TERM IN LONDON.

DIXON *v.* ROBINSON.

GUILDHALL,
June 15.

DEBT on bond. The bond was conditioned for the payment of 1000*l.* and interest on a day certain, and bore a stamp of 5*l.*

A bond conditioned for the payment of 1000*l.* and interest on a day certain, requires only a 5*l.* stamp.

Payne for the defendant objected that the stamp was insufficient, as it covered 1000*l.* only, and not the interest.

Wightman, contra, contended that the words “definitive and certain sum of money” in the act, applied only to the principal sum secured, and cited *Pruessing v. Ing*, 4 B. & A. 204., where a promissory note, payable at three months with interest from the date, was held only to require the stamp corresponding to the principal sum.

Lord LYNDHURST C. B. I think the stamp sufficient.

Verdict for the plaintiff.

Wightman for the plaintiff.

Payne for the defendant.

1831.

GUILDHALL,
Nov. 1.

GARDNER and Another v. SALVADOR.

Where by means within the reach of the master a ship can be so treated as to retain the character of a ship, he cannot by selling her, even *bonâ fide*, convert the average into a total loss, but the underwriters are entitled to have those means used on their account.

ASSUMPSIT on an open policy of insurance for 1000*l.* on the ship *John*, at and from *Liverpool* to *Narva*, subscribed by the defendant for 200*l.*

The declaration stated a total loss by perils of the sea. The defendants pleaded the General Issue, and paid into Court a sum to cover an average loss, the sufficiency of which it was agreed at the trial should be settled out of court, if the defendant should succeed in establishing his right to treat it as an average loss.

It appeared in evidence, that the ship sailed from *Liverpool* on the 9th of *September*; that she afterwards met with bad weather; and on the morning of *September* the 28th was driven by an unknown current on a rock, called the *Thistle Rock*, about twenty-eight miles from *Gottenburgh*. The rock penetrated the bottom of the ship, and made very large holes; it became necessary for the crew to leave her for the preservation of their lives. The captain consulted with several persons, among whom was a Mr. *Eibstern*, who was in the employ of the agent for *Lloyd's* at *Gottenburgh*. These persons were all of opinion that the ship was a complete wreck; that it was impossible to get her off; and that the best course was for the captain to sell her as she lay. She was accordingly advertised on the 2d of *October*, and sold on the 4th by auction for a sum amounting to about 18*l.* of *English* money, her stores having been taken out and sold

separately. It further appeared, that on the night of the 1st or on the morning of the 2d of *October* the ship had floated from the *Thistle Rock* (in consequence of her ballast, and the salt with which she was loaded, being washed through her bottom) to a distance of two or three miles, and had grounded between two rocks on the island of *Torno*. From this situation the mate, with about twenty men, and an anchor and cable, had, on the 3d of *October*, endeavoured for about six hours to get her off, but without success.

The purchaser of the ship succeeded in getting her off in five days, and in four more days brought her to *Gottenburgh*, at an expense of about 75*l*. She was afterwards repaired at a cost of about 300*l*., and in the whole cost the purchaser, including a sum which he had paid for her stores, &c. about 750*l*. Her value after the repairs was stated to be about 1200*l*.

BAYLEY B., to the jury. The question in this case is, whether you are satisfied that there has been a total loss by perils of the sea. I know of no such head of insurance law as loss by sale. If the situation of the ship be such, that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it with a fair hope of restoring it to the character of a ship, he cannot by selling it turn it into a total loss. If she be in a situation such that by means which the captain could reasonably use she could not be brought to retain the character of a ship, it is a total loss.

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GARDNER
and ANOTHER
v.
SALVADOR.

1891:
GARDNER
and ANOTHER
v.
SALVADOR.

Bona fides in the captain will not decide the question ; for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do.

Cases of this kind should be looked at with caution ; the persons about the ship may have an interest in having a ship sold as a wreck.

The ship here was ultimately rescued. If the means by which this was done were within the captain's reach, the underwriters have a right to say, " You ought to have employed them on our account."

The jury, of whom eleven were special jurors, found for the defendant.

In the next term *Williams* moved the Court of Exchequer for a new trial, on the ground that the verdict was against evidence, but the rule was refused.

Williams and *F. Kelly* for the plaintiffs.

F. Pollock and *Maule* for the defendants.

ADJOURNED SITTINGS AFTER TERM
IN MIDDLESEX.

LESLIE v. HASTINGS.

WESTMINSTER,
June 17.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange.

For the defendant the drawer was called, who proved that the defendant had given him a stamp with his acceptance in blank, authorizing him at the time to draw for a certain sum at a specified date. The bill declared on was drawn by him upon this stamp, in conformity with such authority.

An acceptance in blank is sufficient to charge the acceptor, where the bill is afterwards drawn in pursuance of his authority. The 1 & 2 G. 4. c. 78. s. 2. does not affect such acceptances.

Jervis for the defendant argued, that since the stat. 1 & 2 G. 4. c. 78. s. 2., which makes it essential to the effect of an acceptance of an inland bill of exchange that it should be "in writing *on such bill*," an acceptance in blank was altogether a nullity; that it could have no more effect than a parol promise to accept a bill before it is in existence, as to which he referred to the language of Lord *Kenyon* in *Johnson v. Collings*, 1 East, 103. 105., and he cited, in confirmation of his argument, the observations of Mr. *Selwyn* in the last edition of his *Law of Nisi Prius*, p. 326.

Lord *LYNDHURST* C. B. I can entertain no doubt on the point. The provision of the 1 &

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2 G. 4., which has been relied on, was introduced merely to get rid of questions as to promises to accept. Here is an actual acceptance in writing, with an express authority to fill up the bill in a particular mode, and that authority has been pursued. I must advise the jury to find for the plaintiff.

Verdict for the plaintiff.

Williams and Miller for the plaintiff.
Jervis and J. Jervis for the defendant.

See Molloy v. Delves, 7 Bingham 428.

SUMMER CIRCUIT. 2 W. IV.

BODMIN.

Coram ALDERSON, J.

BODMIN,
August 1.

STEPHEN v. GWENAP.

The entries of a person still living, against his interest, are not evidence between other parties; though it be shown that he is abroad, having absconded from a criminal charge, and altogether out of the power of a party to produce him as a witness.

DEBT for money lent.

The question in this cause was whether the defendant was entitled to charge the plaintiff with payments alleged to have been made by him to *Jones*, an attorney and agent for the plaintiff, who had negotiated the loan for him with the defendant. In order to prove the payment, it was proposed to give in evidence the books of *Jones*, in which he had

of the power of a party to produce him as a witness.

debited himself with certain sums as paid by the defendant for the plaintiff.

It was proposed to show that *Jones* had absconded, and was gone to *America*, there being heavy charges against him of a criminal nature, and that he had been made a bankrupt, and had not surrendered to his commission. And it was contended that, under these circumstances, in as much as he was totally out of the reach of the defendant, his entries against his interest were admissible in the same manner as if he was dead.

It was answered that, even if the facts were admitted, the entries could not be given in evidence; there being no case in which such declaration or entries had been received when the party was still living. 1 Phillipps on Evidence, p. 259. 6th edit.

ALDERSON J. said it was important not to extend the admissibility of such evidence; and refused to receive the entries.

Verdict for the plaintiff.

Wilde Serjt. and *Follett* for the plaintiff.

C. F. Williams Bayly and *Crowder* for the defendant.

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STEPHEN

v.

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 TAUNTON.

 Coram TAUNTON J.

 TAUNTON.
 August 9.

REX v. RUSSELL.

The 9 G. 4.
 c. 31. s. 18.
 does not make
 emission
 unnecessary
 to complete
 the offence of
 rape.

THE prisoner was indicted for a rape on the body of *Elizabeth Royce*.

The girl stated sufficient circumstances of violence to complete the offence, and proved penetration clearly, and that she felt warm all over her private parts, but stated that she did not feel any thing come from the prisoner.

The Counsel for the prosecution, in stating the case to the jury, read the eighteenth section of 9 G. 4. c. 31., whereby it is enacted, “that whereas upon trials for the crimes of rape, &c. offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes; for remedy thereof be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only.” And he stated that this section relieved the jury from considering the question of emission.

TAUNTON J. In order to complete the offence it is necessary that he should have had carnal knowledge of her, and that all which constitutes carnal knowledge should have happened. Though the enactment of the statute is such as has been stated, still the jury must be satisfied from the circumstances that emission took place. It is not necessary specifically to prove it, but the circumstances must be such as infer that that fact, and every thing else essential to carnal knowledge, took place. The statute did not intend to make less necessary to complete the offence than before, but merely to prevent the necessity of the indecent exposure resulting from the minute enquiries which usually took place. The jury, therefore, must be satisfied that emission occurred, before they can convict.

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Not guilty.

Moody for the prosecution.

The above decision, as it affects the evidence on a capital charge in a manner favourable to the party accused, is one of considerable importance; but it seems to make the statute 9 G. 4. c. 31. s. 18. absolutely inoperative, for before that statute passed, it was unnecessary to give *direct* evidence of emission; it was enough if the circumstances were such as to satisfy the jury that it had taken place. *Hill's case*, 1 East, P. C. c. 10. s. 3. p. 439, 440.; *Russ. on Crimes*, vol. i. p. 806.; *Harmwood's case*, *ib.*; *Flemming and Windham's case*, 2 Leach, 854.; *Burrows's case*, R. & R. C. C. R. 519.; in which a conviction was held good, on evidence apparently not stronger than that given in the principal case. Besides this, it is material to consider the state of the law at the time of passing the statute. The great doubt had been, not what *proof* was required, but whether the *fact* of emission was a necessary ingredient in the offence; and

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 v.
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the majority of the Judges, until the decision of *Hill's* case, had considered that it was not so. In that case Lord *Loughborough*, *Buller* J., and *Heath* J. adhered to that opinion; and *Ashurst* J., who in *Hill's* case considered emission necessary, had previously, in *Russen's* case, 1 *East*, P. C. c. 10. s. 3. p. 438, 439., 1 *Russell*, 804., given a contrary direction to the jury. Even since the decision of *Hill's* case, text writers have expressed a preference of the former doctrine; but the Judges have, we believe, uniformly adhered to the decision in that case, which, it will be observed, was *in favorem vitæ*. Under these circumstances, it seems likely that the object of the legislature was quite as much to settle the law as to the offence itself, as merely to guard against the indecency of the enquiries which were formerly requisite; and if to alter the law, certainly to alter it by rendering less proof necessary. The object of the act was to prevent offenders "*from escaping* by reason of the difficulty of the proof," and the carnal knowledge is to be "deemed complete upon proof of penetration only." It is difficult to conceive on what principle an offence can be deemed complete on proof which does not establish one of its necessary ingredients.

It may indeed be said, that nothing but an express enactment can render that a capital crime which was not so before; and that consequently, the crime of rape not having been committed, previously to the stat. 9 G. 4., unless emission took place, it cannot be so since the passing of that statute, as the statute does not in terms make that fact unnecessary to the completion of the offence. We have however already observed that, although at the time of passing the statute the recent practice had been to treat it so, the question might fairly be considered as still under controversy and discussion; and in such a case, it is at least a question, whether the stat. 9 G. 4., although in terms only regulating the evidence to be required, may not be considered as a legislative declaration of the former state of the law on the subject. It is to be observed, in addition to the arguments already suggested, that the evil recited is the *escape of offenders* by reason of the difficulty of the proof. If the fact were a necessary ingredient in the offence, it would be inaccurate, in a case where it had not taken place, to describe the party charged as an "offender," or to speak of his "escaping" from a judgment to which, by law, he was not liable.

It is important also to remark that even the limited object of avoiding the enquiries formerly usual, as suggested in the principal case, will not be attained according to the rule there laid down. It is difficult to see in what respect less affirmative proof would be necessary on the part of the prosecution than before ; but at all events, as long as the fact itself is considered to be material, the disproof of it must be an object of cross-examination.

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RUSSELL.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN K. B.

AT THE SITTINGS IN AND AFTER
MICHAELMAS TERM,
2 W. IV. 1831.

SECOND SITTINGS IN TERM IN MIDDLESEX.

1831.
WESTMINSTER,
Nov. 15.

HURRY *v.* RICKMAN and SUTCLIFFE.

A landlord distraining is *prima facie* liable for the act of his bailiff in taking goods privileged from distress, though they never come to his hands.

But if, when he knows the circumstances, he disclaims and repudiates the act, he is not bound by it.

TROVER. The defendant *Rickman* pleaded the general issue: the other defendant, *Sutcliffe*, suffered judgment by default.

The action was brought by the plaintiff to recover the value of cloth sent by him to a tailor, to be made into clothes, and distrained, while in the possession of the tailor, for rent due from the tailor to the defendant *Rickman*. The other defendant, *Sutcliffe*, was the broker who made the distress, and he had undoubtedly notice of the plaintiff's property in the goods, and the circumstances under which they were in the tailor's possession; but there was nothing to fix the defendant *Rickman* with any knowledge of these facts at the time

when the distress was taken, nor were the goods shewn to have ever been in his actual possession ; nor were they ever sold. Evidence was given of a demand of the goods from *Rickman*, who referred the plaintiff to *Sutcliffe* ; but there was some doubt about the terms of the answer given, whether it was a refusal to deliver, or a mere denial of any knowledge about them, and a reference to *Sutcliffe* as the only person who knew any thing about the transaction.

1891.
 HURRY
 v.
 RICKMAN and
 SUTCLIFFE.

LITLEDALE J., in summing up to the jury, after observing that the goods were, under the circumstances, privileged from distress, left it to the jury to say, whether the defendant *Rickman* had disclaimed and repudiated the act of his bailiff in taking them. *Primâ facie* he would be liable for the act of the agent whom he employed : but it is clear that he knew nothing of the circumstances at the time ; and if, when he came to the knowledge of them, he disclaimed and repudiated the act, I think that he would not be irretrievably bound by it. Before you find a verdict in his favour however, you must be satisfied that he did so : it is not enough that he merely did not concur in it ; he has to free himself from a liability *primâ facie* imposed upon him. His Lordship then commented upon the evidence, pointing out particularly that *Rickman* did not appear at all to have exerted himself to procure the return of the goods, or to have done more than deny any knowledge of, or concern in, the transaction ; and the jury found a

Verdict for the plaintiff against both
defendants.

1831.

HURRY

v.

RICKMAN and
SUTCLIFFE.*Campbell and Steer* for the plaintiff.*Comyn* for the defendant *Rickman*.

SITTINGS AFTER TERM AT WESTMINSTER.

REX v. MUDIE.

WESTMINSTER,
Nov. 26.

An indictment for perjury will not lie, under the seventy-first section of 7 G. 4. c. 57., against an insolvent debtor for omissions of property in his schedule; such offence being made liable to certain punishment under the seventieth section as a substantive misdemeanor.

INDICTMENT for perjury, alleged to have been committed in the insolvent debtors' court.

The indictment stated that the defendant petitioned for his discharge, and gave in his schedule, on oath that the same and all its contents were true, and contained a full, true, and perfect account of all his just debts, credits, &c.; and then went on to state, that the said schedule and its contents were not true, and that certain persons, whose names were set out, were debtors to the defendant at the time of giving in his schedule, and that they were omitted in the schedule, and so the said defendant committed wilful and corrupt perjury, against the statute, &c.

Adolphus for the prosecution offered to give evidence that other persons, whose names were not set out in the indictment, were also debtors to the defendant, and were omitted in the schedule.

This was objected to by *Busby* for the defendant; and

Lord TENTERDEN C. J. said that the evidence must be confined to the cases specified in the indictment, as the defendant would only come prepared to answer those cases. (*a*)

1831.

 REX
 v.
 MUDIE.

The defendant's account book, given in by him to the insolvent debtors' court, was put in, and several persons, whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and "paid" was marked to their accounts in the defendant's writing.

These persons were called, and stated that they did not pay until after the petition and schedule.

Busby objected that this was not sufficient evidence, inasmuch as it was only oath against oath: the defendant having sworn that the debts were paid, a single witness, with respect to each particular debt, that it was not, at the particular time of the schedule.

Lord TENTERDEN C. J. I feel the force of the objection. It is a very important point, whether the defendant's book and oath on one side be not met by the oath of the witnesses on the other side. It would be very difficult to give any other evidence. I will not stop the case. If the defendant is convicted, you can move for a new trial.

Busby then objected that no indictment for perjury would lie for an omission of this description.

(*a*) See *R. v. Hepper*, R. & M. N. P. C. 210.

1831.

REX

v.

MUDIE.

The seventieth section of the act (7 G. 4. c. 57.) provides for omissions—“ That in case any prisoner shall, with intent to defraud his or her creditors or creditor, wilfully and fraudulently omit in his or her schedule, so sworn to as aforesaid, any effects or property whatsoever, or retain or except out of such schedule, as wearing apparel, bedding, working tools and implements, or other necessities, property of greater value than twenty pounds, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor, and thereupon it shall and may be lawful for the court before whom such offender shall have been so tried and convicted to sentence such offender to be imprisoned and kept to hard labour for any period of time not exceeding three years.” The seventy-first section provides, “ That if any prisoner who shall apply for his or her discharge under the provisions of this act, or any other person taking an oath under the provisions of this act, shall wilfully forswear and perjure himself or herself in any oath to be taken under this act, and shall be lawfully convicted thereof, he or she so offending shall suffer such punishment as may by law be inflicted on persons convicted of wilful and corrupt perjury.” The first offence, that of omissions, is made punishable as a misdemeanor ; and the offence of perjury, enacted by the seventy-first section, only applies to positive affirmations contained in the schedule.

Adolphus in answer contended that the party would be still liable under the seventy-first section

for perjury ; that perjury being committed to aid and carry into effect the offence marked out in the seventieth section.

1831.
 REX
 v.
 MUDIE.

Busby. That cannot be, as the seventieth section includes the false oath in providing for omissions in the schedule *so sworn to*.

LORD TENTERDEN C.J. The legal offence of perjury can only be committed in certain cases of oaths taken under the common law, or in oaths taken under particular statutes, in which the offence is provided for. It by no means necessarily follows that perjury must be committed in a false oath taken under a particular statute. Though a high misdemeanor, it would not be perjury unless so made by the statute requiring the oath ; and there are many cases of statutes requiring oaths, and not creating the offence. Upon looking to this statute, I think the legislature contemplated the particular case of omissions, and provided for them in the seventieth section, the debts omitted being comprehended under the terms, “ effects or property,” there used. The act then goes on in the seventy-first section to make other falsehoods in the oath of the party punishable as perjury. I therefore think the defendant must be acquitted.

Not guilty.

Adolphus and Talfourd for the prosecution.

Busby for the defendant.

1831.

 ADJOURNED SITTINGS AT WESTMINSTER.

WESTMINSTER,
Nov. 30.

GASKELL, Administrator of ISABELLA JACKSON, v. MARSHALL and POLAND, Sheriff of MIDDLESEX.

Goods of an intestate taken possession of and used by an administrator, in the house of the intestate, for three months after the death of the intestate, cannot be taken in execution for the administrator's own debt.

TRESPASS for taking goods, the property of the plaintiff as administrator.

The goods were taken in execution by the defendants under a *fi. fa.* against the plaintiff for his own debt.

Isabella Jackson, who was the niece of the plaintiff, died in *August* 1830. The plaintiff, who had, with his family, lived with her from *March* preceding in her house, continued to live there after her death, and used her furniture. He took out letters of administration in *August* 1830, and *Isabella Jackson's* name continued over the door. The execution was levied in *November*, and the plaintiff immediately gave notice to the sheriff of the goods being the property of the intestate; and, on the sheriff's insisting on selling, the plaintiff, on the 2d of *December*, for the purpose of releasing the goods, paid the amount of the debt, 73*l.*, under protest.

Gurney for the defendant contended that the plaintiff had made the goods his own by using the house and property as his own, and holding him-

self out to the world as owner of both; and he relied on *Quick v. Staines*, 1 B. & P. 293., as an authority to shew that the sheriffs had a right to take the goods in execution.

1831.

 GASKELL
 v.
 MARSHALL
 and POLAND.

LORD TENTERDEN C. J. The marriage in that case makes all the difference. This case is more like that of *Farr v. Newman*, 4 T. R. 621. Here the notice is given in *November*; the time is not sufficient to make the goods the plaintiff's property.

The plaintiff may take a verdict; but I will give the defendant leave to move to enter a nonsuit.

Verdict for the plaintiff.

Sir *J. Scarlett* and *Platt* for the plaintiff.

Gurney and *Ball* for the defendant.

No motion to enter a nonsuit was made.

ADJOURNED SITTINGS AFTER TERM AT
WESTMINSTER.

SOLITA *v.* YARROW.

WESTMINSTER,
Dec. 3.

ASSUMPSIT by the indorsee against the drawer and indorser of a bill of exchange, with a count for goods sold and delivered.

The bill, which was for 7*l.*, was admitted to be drawn and indorsed by the defendant.

A jury may judge of a disputed handwriting by comparing it with other documents in evidence for other pur-

poses, and admitted to be the handwriting of the party.

1831.

SOLITA

v.

YARROW.

The plaintiff put in a letter purporting to be written by the defendant, dated a few days before the bill became due, ordering the plaintiff, who was a tailor, to send three yards of cloth to a Mr. *Lindo's* for him the defendant. The cloth was sent to Mr. *Lindo's*, but it was denied by the defendant that the order was written by him ; and witnesses were called on both sides to prove and disprove the handwriting respectively.

Platt for the plaintiff in his reply relied strongly on the comparison of the disputed writing with the admitted writing in the bill, especially in respect of the name of the plaintiff (which appeared on the special indorsement), and also in the likeness of several letters.

Lord TENTERDEN C. J. in summing up made similar remarks, and desired the jury to take the papers and compare them.

Verdict for the plaintiff for the whole demand.

Platt for the plaintiff.

Coltman for the defendant.

The same course was adopted in *Griffith v. Williams*, 1 C. & J. 47. and recognised by the Court of Exchequer, *Bolland B.* especially grounding his judgment on such a comparison. The rule however only authorises the comparison of writing with documents which are put in evidence for other purposes. In *R. v. Morgan*, Glamorganshire Lent assizes, 1831, which was an indictment against the prisoner for sending a threatening letter, there being no proof that he sent it except from its being supposed to be in his handwriting, and the evidence of handwriting

being very slight, it was proposed, on the part of the prosecution, to put in a document undoubtedly written by the prisoner, but unconnected with the charge in the indictment, that the jury might inspect it and compare it with the letter in question; and it was contended, on the authority of *Griffith v. Williams*, that the evidence was admissible: if the comparison be admissible in itself, it must be allowable to put papers in evidence for the purpose of enabling the jury to make it.

1831.

SOLITA

v.

YARROW.

BOLLAND B., on the authority of the case cited, was at first inclined to allow the evidence to be given; but afterwards said, that on a fuller recollection of the case of *Griffith v. Williams*, he thought it was not the intention of the Court in that case, and certainly not his own, to decide any thing more than that the jury were at liberty to compare the disputed handwriting with that of documents, which were in evidence in the cause independently of that question. To say that a party may select and put in evidence particular letters, bearing a certain degree of resemblance or dissimilarity to the writing in question, is a very different thing from allowing the jury to form a conclusion from inspecting a document put in for another purpose, and therefore free from the suspicion of having been so selected. The learned Judge therefore rejected the evidence.

The prisoner was acquitted.

Malkin and *E. V. Williams* for the prosecution.

Socket and *Whitcombe* for the prisoner.

See Phillipps on Evidence, p. 490. 7th edition, where it is said, "In the cases which have been considered, the proof of handwriting is founded on a knowledge of the general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writing in question; but no other kind of comparison will be allowed. It is an established rule of evidence, that handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine." This position, according to the above cases, would be now considered too general.

1831.

WESTMINSTER,
Dec. 8.DRUMMOND and Another, Gents., Two, &c.
v. BURT, Gent., One, &c.

Where the Nisi Prius record has been altered, after it was passed, by one of the parties without an order from a Judge, the Court will try the cause as it stands on the record, and will not amend it at Nisi Prius, by striking out the alteration, or the part of the declaration in which the alteration was made.

CASE for libel.

It was stated that at the time the *Nisi Prius* record was passed there were blanks left in the declaration for the names of persons who were supposed to have refused to employ the plaintiffs in consequence of the libels complained of; that the record was taken away by a clerk of the plaintiffs, to have it resealed, and that while it was so in his custody, the blanks were filled up without any order from a Judge authorising the alteration.

Campbell for the defendant objected to the trial of the cause; but Lord *Tenterden* C. J. said that he must try the record as he found it, and leave the defendant to take advantage hereafter of the variance between the *Nisi Prius* record and the issue, if any material variance existed.

Sir *J. Scarlett* for the plaintiffs applied for leave now to amend the record by striking out the special damage altogether, or else by striking out merely the words inserted, which might be treated as a nullity, having been added without any authority.

LORD TENTERDEN C. J. refused to allow either course; saying he could only try the record as it came before him, in which the words were found;

and that he would make no order to relieve a party from the consequences of altering a record of the Court without having obtained due authority to do so.

1831.
 DRUMMOND
 and ANOTHER
 v.
 BURT.

The record was then withdrawn.

Sir *J. Scarlett* for the plaintiffs.

Campbell and *Hutchinson* for the defendant.

At the adjourned sittings in *Middlesex* after *Hilary* term 1830, on the cause of *Whitehead v. Scott* being called on, *F. Pollock* rose for the defendant, and stated that there was no issue on the record; and on examination it appeared, that there was only the declaration, the plea being omitted.

Campbell for the plaintiff applied for the cause to stand over, that he might amend by inserting the plea, which was a mere clerical omission; or that at all events, as there was negligence on both sides, the cause should only be struck out, and the plaintiff not be compelled to withdraw his record.

LORD TENTERDEN C. J. I think I ought not to allow an amendment. It is the duty of a Judge to take care that business shall be conducted with ordinary care. Here is gross negligence, and laxity in allowing amendments has, in my opinion, done more harm than good. However much we may wish in this particular instance to correct the evil, the general rule ought to prevail. The cause must be struck out; there is nothing for me to try. Upon what terms any amendment shall be made, is for future consideration.

The cause was struck out of the list, and tried afterwards at the sittings after *Michaelmas* term 1830. See *sup.* p. 2.

1831.

SITTINGS AFTER TERM IN LONDON.

GUILDHALL,
Nov. 28.

WELSTEAD *v.* LEVY.

The declarations of an indorser of a bill, made whilst he was holder, are evidence to go to the jury against a holder under an indorsement made before the bill was due, if there be evidence which satisfies the Judge that the indorsee is merely an agent to sue for the indorser; the jury are afterwards to judge, first, of the agency, and then of the effect of the declarations.

THIS was an action by the indorsee of a bill of exchange against the acceptor.

The bill was drawn and indorsed by *Monro* to *Benham*, who indorsed to the plaintiff.

The defence was, that the bill was accepted without value, in order to enable *Monro*, who was in prison, to raise money to get his discharge, and that he had indorsed it to *Benham* for this purpose without value given by him. In order to prove this, a witness for the plaintiff was asked, in cross-examination, as to *Benham's* declarations made whilst he was holder of the bill, but before the bill became due. This was refused by the learned Judge, unless it could be shewn that the plaintiff stood on *Benham's* title. (a)

It appeared that the defendant accepted without value; and further, on cross-examination of the plaintiff's witness, that *Benham*, two days before the bill, which was for 65*l.*, became due, offered the defendant to take little more than half that value in money and goods; and this not being

(a) See *Smith v. De Wruit*, R. & M. N. P. C. 212.; *Shaw v. Broome*, *ib. n.*; *Barrough v. White*, 4 B. & C. 325.; *Beauchamp v. Parry*, 1 B. & Ad. 89.

given, on the day the bill became due, he indorsed it to the plaintiff for 65*l.*, which was handed over by the plaintiff to *Benham*, in the presence of a witness called in for that purpose and then dismissed, and afterwards the bill was presented to the defendant in the evening of that day.

It was contended that the plaintiff now stood on the evidence as the probable tool of *Benham*; and if that were so, *Benham's* declarations were clearly evidence.

PARKE J. It is a question for me on this evidence, whether the plaintiff is merely the agent of *Benham*. It appears to me that he is; and therefore I think his declarations admissible. It will be for the jury afterwards to say whether they are of that opinion, and if so, to judge of the effect of the declarations.

The declarations were then received, and left by the learned Judge to the jury, who returned a
Verdict for the defendant.

Comyn for the plaintiff.

Moody for the defendant.

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WELSTEAD
v.
LEVY.

1831.

 ADJOURNED SITTINGS IN LONDON.

 GUILDHALL,
 Dec. 16.

HUMPHREYS v. BOYCE, Administrator, &c.

The declarations of a married woman, during coverture, of the non-payment of money lent to her before marriage, are admissible in evidence for the plaintiff, in an action brought against her husband as her administrator.

ASSUMPSIT against the defendant, as administrator of his wife, for money lent to her before her marriage.

The loan to her, and her subsequent marriage, having been proved,

Campbell for the plaintiff proposed to give evidence of admissions made by her during the coverture, that the money remained due.

Sir *J. Scarlett* for the defendant objected to the reception of the evidence, and said that *Bayley J.*, in a cause tried before him at *Carlisle*, had held the same evidence to be inadmissible, on the authority of a case decided by Lord *Kenyon*, of which he had a note. Were not this held to be the law, a married woman might make admissions which would ruin her husband.

Campbell. In this case the character of husband is out of the question. The defendant is sued merely as administrator of his wife, and on a cause of action which, had she outlived him, would have survived against her.

Lord TENTERDEN C. J. I think I ought to receive the evidence. The defendant's character of husband has nothing to do with the present action: the wife, like any other person, may bind her administrator. I will take a note of the objection; but if the evidence is pressed, it seems to me that I must receive it.

1831.
 HUMPHREYS
 v.
 BOYCE.

Campbell said that he could do without the evidence; and therefore, although he did not doubt its admissibility, he would not press it: and the evidence was withdrawn.

Verdict for the plaintiff.

Campbell and *F. Kelly* for the plaintiff.

Sir J. Scarlett and *Channell* for the defendant.

DICKINSON, Gent., One, &c. v. HATFIELD.

GUILDHALL,
 Dec. 16.

ASSUMPSIT by the payee against the acceptor of a bill of exchange, and for money paid. Pleas, *non assumpsit*, and the statute of limitations.

The bill of exchange was proved; and then, to take the case out of the statute, the plaintiff produced a letter from the defendant, in which he promised to pay "the balance" due from him to the plaintiff, but did not specify any particular

A promise in writing to pay "the balance" due, is enough under stat. 9 G. 4. c. 14. to take a case out of the statute of limitations, although the writing does not express the amount of the balance.

But if the whole evidence be proof of the writing, and of the original cause of action, the plaintiff can only recover nominal damages.

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DICKINSON
v.
HATFIELD.

amount. The letter also directed the plaintiff to charge the postage to his account.

Comyn for the defendant. This evidence is not sufficient to take the case out of the statute of limitations. The object of the stat. 9 G. 4. c. 14. will be best enforced by treating it as requiring an express promise in writing to pay a specific debt, and by considering that a promise to pay a balance not mentioned is not within it. This principle was acted on in a recent case in the Common Pleas. There the plaintiff produced a composition deed, whereby the defendant engaged to pay his creditors therein named, of whom the plaintiff was one, the amount of their debts written opposite their names. The plaintiff did not execute the deed, and the amount of the debt was not ascertained by it. The Court was of opinion that the evidence did not take the case out of the statute. (a)

Then, if the promise relied on is not within the statute 9 G. 4. c. 14., the plaintiff is not entitled to nominal damages : for the foundation of his claim altogether fails. The postage is not within any count of the declaration.

Lord TENTERDEN C. J. The plaintiff may recover for the postage on the count for money paid. As to the other question, it seems to me, on the best consideration I can give to the statute 9 G. 4. c. 14., that the letter produced is evidence of a new or continuing contract at the time of its

(a) *Kennett v. Milbank*, 8 Bing. 38.


date, and will entitle the plaintiff to a verdict. The act does not require the amount of the debt to be specified. Before it passed, a verbal promise to pay the balance would have entitled the plaintiff to recover : a similar promise in writing will have the same effect since. But I think he can only recover nominal damages : the promise is only to pay a balance, and there is no evidence to shew what the balance is. As the amount is so small, I will give leave to move to enter a nonsuit, that the parties may not have to come down again.

Verdict for the plaintiff, 1s. 8d.

No motion was made in the ensuing term.

Barstow for the plaintiff.

Comyn for the defendant.

1831.

 DICKINSON
 v.
 HATFIELD.

BRADSHAW v. BENNETT.

GUILDHALL,
 Dec. 17.

ASSUMPSIT for money paid.

The action was brought to recover the deposit paid on a purchase of ground rents at a sale by auction. The defendant was the owner of the rents sold ; the plaintiff complained that they did not, in a variety of circumstances, answer the description in the conditions of sale, and claimed in consequence to rescind the bargain.

To prove the terms of the sale, the plaintiff called for the agreement for the purchase which

In an action against the vendor of an estate, to recover the deposit on a contract for the purchase, if the defendant on notice produce the contract, the plaintiff need not prove its execution.

1831.
BRADSHAW
v.
BENNETT.

he had subscribed, and under which he paid the deposit. *Campbell* for the defendant produced it, but insisted that the execution must be proved by the subscribing witness.

Williams and *F. Kelly* for the plaintiff contended that this was unnecessary, on the general principle that an instrument produced on notice by a party claiming an interest under it did not require to be so proved.

Campbell for the defendant. None of the cases decided on that ground resemble the present. They are all of parties enjoying a benefit under the instruments which they produce: as, for instance, of a tenant who holds land under a lease, and produces it in an action for infringing its covenants. Here the validity of the contract itself is in issue: whether the defendant enjoys any thing under it or not depends on the result of this action: and in such a case, of all others, it is material to have the testimony of the witness who was present at the execution.

LORD TENTERDEN C. J. I cannot distinguish this from the class of cases referred to on the part of the plaintiff. The defendant has received the deposit under, and by virtue of, the agreement in question: that seems to me to be taking an interest under it. The subscribing witness therefore need not be called.

The cause was afterwards made into a special case on other points. *Campbell* applied to have the question on the evidence of the contract made

a part of the case ; but Lord *Tenterden* refused, saying he had no doubt on the subject.

Williams and *F. Kelly* for the plaintiff.

Campbell and *Hutchinson* for the defendant.

1831.

BRADSHAW

v.

BENNETT.

INNES, surviving Assignee of R. and C. HINGESTON, Bankrupts, v. STEPHENSON and Others.

GUILDHALL,
Dec. 19.

ASSUMPSIT for money had and received.

The plaintiff was the surviving assignee of the Messrs. *Hingeston*, who became bankrupts in the year 1807.

The defendants, who were bankers in *London*, were appointed bankers to the estate of the bankrupts ; and on opening the account, the plaintiff and his two co-assignees signed their names in the signature book of the defendants in the usual way.

In the year 1817 one of the assignees died, and after his death a dividend of 1s. 4d. in the pound was declared.

The course of business in the office of the solicitors to the commission, upon a dividend being declared, was to make out a list, which they called a *Dividend List*, containing the names of the creditors in alphabetical order. In this list the amount of the dividend of each creditor was placed opposite to his name, and at the bottom of the whole list was written an order in the following form : —

Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment to one of those persons without the authority of the others.

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INNES

v.

STEPHENSON
and OTHERS.“ *London, March, &c.*“ Messrs. *Stephenson* and Co.

“ Please to pay the several persons above named the several sums set opposite their respective names, on their severally producing a receipt, signed by themselves respectively, and countersigned by the undersigned.

“ *A. B.* } Assignees of *E. F.* and
 “ *C. D.* } *G. H.*, bankrupts.

“ *S. Wadeson*,“ *S. M. Wadeson*,“ *S. J. Wadeson*,”

The names of the solicitors to the commission.

A list of this kind was made out on the occasion of the dividend above mentioned; and there was evidence from whence the jury might presume that it was delivered to the defendants.

In the year 1815 the plaintiff retired from business, and went to reside in *Scotland*, where he continued to live up to the present time. His surviving co-assignee resided in *London* until his death, which took place in 1826.

A considerable number of payments were made by the defendants to creditors named in the dividend list; but between the years 1820 and 1826 nine payments were made by them, which were stated in the pass book to have been made to persons not named in the dividend list, and in sums not corresponding with any of the sums there mentioned.

In the year 1826 the pass book was in the hands of the defendants; and in the *August* of that year it, together with three checks, was sent to the soli-

citors to the commission, in consequence of an application having been made by them for information as to the state of the account.

The checks were in the usual form, and purported to be drawn by the plaintiff and his co-assignee. The signatures of the latter were genuine, but those of the plaintiff were forged; and it was proved that the forged signatures of the plaintiff, which were in a different handwriting from those of his co-assignee, were very unlike his genuine signature, and also very unlike that contained in the signature book of the defendants.

It was contended, on behalf of the defendants, that there was not sufficient evidence of the dividend list having been delivered to the defendants, and that a forgery could not be presumed; that six of the payments remained wholly unimpeached, and as to the other three, that one co-assignee had a right to draw checks so as to bind the other, especially in his absence; and that the defendants were consequently justified in paying the checks which were produced.

Some evidence was given on behalf of the defendants as to their course of business; and upon the counsel for the plaintiff rising to reply,

Lord TENTERDEN C. J. stopped him, and said, that the case was a very clear one; that money was paid to bankers by three persons, not partners in trade; that it had been stated that one of them could draw checks so as to bind the others, but that was not the law, and to allow it would defeat the very object of paying the money in jointly; and it must be well known to the jury that it was

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v.

STEPHENSON
and OTHERS.

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STEPHENSON
and OTHERS.

not the practice unless the persons drawing stood in the relation of partners; that it had been proved that the signatures of the plaintiff's name to the three checks produced were forged; and that, under the circumstances, the presumption was, that the other six payments had been made on checks of the same description.

His Lordship added, that it had been stated by the counsel for the defendants that there was not sufficient proof of the delivery of the dividend list; but that, as then advised, he thought that unless that list was delivered, the defendants had no authority to pay at all; and therefore, for their own protection as to the payments rightly made, it must be taken that the dividend list had been delivered.

Verdict for the plaintiff. (a)

Follett and Martin for the plaintiff.

F. Pollock and R. V. Richards for the defendants.

(a) See *Stone v. Marsh*, R. & M. N. P. C. 364. *Stewart Lee*, 1 M. & M. 158.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,
IN THE EXCHEQUER,

AT THE SITTINGS AFTER

MICHAELMAS TERM,

2 W. IV. 1831.

SITTINGS AFTER TERM AT WESTMINSTER.

BLOCK and Another *v.* BELL.

1831.

WESTMINSTER,
Nov. 26.

ASSUMPSIT by the holder against the maker of a promissory note, payable to bearer.

The instrument, when produced, was not in the handwriting of the defendant, nor signed by him at the foot, but ran in the following form:—
“On demand, I promise to pay to *A. B.* or bearer the sum of 15*l.* for value received;” and was addressed in the margin to the defendant, who wrote across it, “Accepted, *J. Bell.*”

An instrument in the following form:—
“On demand. I promise to pay,” &c. addressed to the defendant, and *accepted by him*, may be declared on as a promissory note.

Lord LYNTHURST C. B. held, that this amounted to a promissory note; the instrument containing a promise to pay, and the signature of the defendant,

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although in terms an acceptance, acting as an adoption of that promise by him.

Verdict for the plaintiffs.

J. Jervis for the plaintiffs.

The cause was undefended.

Edis v. Bury, 6 B. & C. 433.

ADJOURNED SITTINGS IN LONDON.

GUILDHALL,
 Dec. 10.

GERVAS v. BURTCHLEY.

Affidavits are not admissible in support of an application for immediate execution under 1 W. 4. c. 7. s. 2.

That statute only applies to cases where, on the facts at the trial, the Judge thinks there ought to be immediate execution.

DEBT on bond.

This cause was tried on the 9th before the Lord Chief Baron, and a verdict given for the plaintiff.

Application for immediate execution was then made, and refused.

The application was renewed this day by *Cresswell*, on an affidavit that the defendant had threatened to avoid any execution by disposing of his property.

Lord LYNDHURST C. B. I cannot try a collateral issue on affidavit. The defendant will have to offer counter affidavits.

Cresswell stated that it was constantly done on the last Northern circuit.

Lord LYNDHURST C. B. I think it a very inconvenient course, and will not act upon affidavits.

The statute was only intended to apply where the Judge on the facts appearing on the trial thought there should be execution immediately.

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Cresswell for the plaintiff.

SMITH v. MATHEWS.

EXCHEQUER,
 Dec. 10.

CASE for slandering the plaintiff in the way of his trade.

The plaintiff was a builder, and had undertaken and executed a contract to build *St. John's Charity School Rooms, Bermondsey*. The words complained of imputed to the plaintiff that he had used red pine timber, an inferior sort of timber to that which the contract required.

The defendant pleaded the general issue, and a justification that the words were true.

It appeared that the defendant, who was in the same business as the plaintiff, had made a tender for the same work, and during its execution had, in a conversation with the surveyor of the works, made a statement to the same effect as that complained of. After this, reports having reached the committee appointed to superintend the charity and the plaintiff that inferior timber was used, the plaintiff suspended the work, and demanded an enquiry. The committee instituted one, and employed the defendant to survey and report. He did so, and stated that red pine timber was used, and this was the statement complained of in the action.

Where a person originates false reports prejudicial to a tradesman, and being called on by the employers of the tradesman to examine the matters complained of, repeats to them the false statements, such statements are not privileged communications.

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Evidence was offered by the defendant to shew the truth of the statement, and it was also contended that the communication was privileged.

Lord LYNDHURST C. B. after putting the question to the jury whether the statement were true, and being answered in the negative, told the jury that if they believed the reports originated with the defendant, and that what he had said produced the enquiry, the communication was not privileged. If they believed it originated elsewhere, and that the defendant, being called on to report, had *bonâ fide* made the statement, they should find for the defendant.

Verdict for the plaintiff, damages 5*l*.

J. Williams and *Comyn* for the plaintiff.

Jervis and *R. V. Richards* for the defendant.

In *Pattison v. Jones*, 8 B. & C. 578., a master, hearing that his late servant was about to be engaged to another person, wrote to that person to say that he had discharged the servant for misconduct, received a letter in answer enquiring into the particulars, and then wrote a detailed statement of the occurrences on which he professed to have proceeded. On an action by the servant for a libel contained in this second letter, it was left to the jury to consider, the enquiries having been invited by the defendant, whether, in the answer which he returned, he acted *bonâ fide* or maliciously: and the jury having found for the plaintiff, the Court refused to disturb the verdict. In the principal case, when the jury had once determined the statement to be false, there could be no doubt, under the circumstances, that if it originated with the defendant, it could not, even on the second occasion, be made *bonâ fide*.

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The following case was omitted in its proper order.

IRVING v. RICHARDSON.

GUILDHALL,
Feb. 24.

ASSUMPSIT for money had and received.

The defendant had insured 1700*l.* on the ship *Swiftsure*, valued at 3000*l.*, with a company at *Glasgow*; and had afterwards insured 2000*l.* on the same ship, valued again at 3000*l.*, with the *Alliance* Marine Insurance Company. The ship was lost, and the defendant received the amount of the insurances from both companies; the *Alliance* Company, at the time of the payment, not being aware of the first insurance. On being made acquainted with it, the present action was brought by the plaintiff, their chairman, according to act of parliament, to recover the proportion paid by the *Alliance* Company of the 700*l.*, the excess of the whole sum paid above the valuation. The ship was proved to be really worth more than 3700*l.*, the sum received on the two policies.

A party, insured by one policy for 1700*l.* on the ship *S.*, valued at 3000*l.*, and by another for 2000*l.* on the same ship, valued again at 3000*l.*, cannot receive more than 3000*l.* on the two policies.

There was a question of fact, whether the defendant, who was mortgagee of the ship for a sum less than 3000*l.*, had effected the policy for his own benefit only, or for that of the mortgagor also: and *Campbell* for the defendant, in stating the case to the jury, had contended that, if they thought the insurance effected for the benefit of the mortgagor, as well as of the defendant, the plaintiff was not entitled to recover; the defendant,

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according to the case of *Bousfield v. Barnes*, 4 Campb. 228., not being bound by the sum mentioned in the policy as the value.

Lord TENTERDEN C. J. left the question of fact to the jury, who found a verdict for the plaintiff, on the ground that the defendant had only insured his own interest as mortgagee. After the verdict,

Lord TENTERDEN C. J. said, I was prepared to give my opinion in point of law, if it had been necessary, that this case is not governed by that cited. There the sum mentioned as the value was different in the two insurances; here it was the same. I am of opinion that where a person effects two insurances, declaring the same value in each, he is bound by that sum, and cannot receive beyond that extent.

Sir *J. Scarlett* and *R. V. Richards* for the plaintiff.
Campbell and *Roberts* for the defendant.

A new trial was afterwards moved for, but the rule was refused (2 B. & Ad. 193.); and the point stated above was not discussed.

END OF PART I.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

HILARY TERM,

2 W. IV. 1832.

ADJOURNED SITTINGS AT WESTMINSTER.

REX on the Prosecution of SMYTH *v.* ANN
SMYTH, SCHOLEFIELD, GODDARD, and
FINNEY.

1832.
WESTMINSTER,
Feb. 1.

INDICTMENT for a forcible entry on the dwelling-house of the prosecutor. There was a count in the statute, and a count at common law.

The defendant, *Ann Smyth*, was the wife of the prosecutor, but lived apart from him. It was stated, on the part of the prosecution, that she had obtained possession of the house in question under an agreement for a lease, in which she had represented herself, and was described, as a widow; and that the prosecutor, hearing of the circumstances, had entered upon the house for the purpose of delivering up possession to the owner, who had consented to receive it. On the prosecutor's

A wife may be guilty of a forcible entry on the dwelling-house of her husband, and other persons also if they assist her in the force, although her entry in itself is lawful.

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OTHERS.

taking possession of the house, and leaving a man in possession, Mrs. *Smyth*, the defendant, quitted it, and her servant was turned out, leaving some goods behind. Two days after, Mrs. *Smyth*, accompanied by the other defendants, went to the house and demanded admittance, and not obtaining it, she, assisted by a man not included in the indictment, got over the iron railing in front of the house, broke a pane of glass in one of the windows, and so entered the house, and then opened the door and admitted the other defendants. They took no part in her so entering, but went with her, and were present at the time.

Archbold, for the prosecution, produced the agreement entered into by Mrs. *Smyth* for the taking of the house; but it appeared not to be stamped. *Archbold* contended that this did not render it inadmissible in evidence; the whole proceeding being fraudulent and void, no stamp is required. It has been so held in many cases of forged instruments.

LORD TENTERDEN C.J. Those cases are not in point here. The indictment is not in any way founded upon the instrument produced. If it were, if the agreement constituted the crime, the defendant certainly could not exclude it because unstamped; but here it is only collaterally introduced, and must be subject to the ordinary rules of evidence.

Other evidence was then produced, and at the close of the case, *Cockburn*, for the defendant,

Ann Smyth, objected that the indictment could not be maintained against her. The dwelling-house on which the entry is made is described as the dwelling-house of the prosecutor, her husband; that description, whether, under the circumstances, correct or not, is material. If incorrect, therefore, there must be an acquittal on the ground of variance; if correct, a wife cannot be guilty of a forcible entry on the property of her husband. It is laid down by Hawkins, b. i. c. 64. s. 32., that a man cannot make a forcible entry into his own house, and he cites Moore, 786., *Lady Russell v. The Earl of Nottingham*, Cro. Jac. 18., *Lady Russell's Case*, and 2 Keb. 495., *R. v. Westley*, as authorities for that position. Then, if the prosecutor himself could not commit a forcible entry on this house, no more can his wife. His possession is her possession also: he has no right to exclude her, and she cannot commit a trespass by going there; and if so, she cannot commit a forcible entry, which is only an aggravated trespass.

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LORD TENTERDEN C. J. It has been frequently held that a house, occupied by a wife living apart from her husband, and taken by her in her own name, is properly described as the husband's: in an indictment for burglary, for instance, it ought to be described as his dwelling-house. (a) There is no variance, therefore. On the other point, although a wife certainly cannot commit a trespass on the property of her husband, I am by no means satisfied that, if she comes with strong hand, she

(a) *French's case*, R. & R. C. C. R. 491. *Wilford's case*, *ibid.* 517.

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 {
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may not be indictable for a forcible entry, which proceeds on the breach of the public peace.

His Lordship, in summing up to the jury, then said, that no indictment could be maintained for a mere trespass; there must be actual force, or such show of force as may prevent resistance. In the present case, no trespass could be committed by the principal defendant, Mrs. *Smyth*. As at present advised, however, I think she may be liable for a forcible entry, if her entry was made under circumstances of violence amounting to a breach of the public peace. In considering this, as well as with reference to the verdict to be given respecting the other defendants, it will be necessary to look to their conduct. They certainly took no part in the actual entry; still, if you think they went to assist Mrs. *Smyth* by a show of force, they would be guilty if she is; if they were there without any such purpose, they will be entitled to your verdict. If that should be your opinion, the case against her would be reduced to the mere fact of her getting in by breaking the window; and you would then have to say, bearing in mind that she could not commit a trespass, whether that is, in itself, a violence such as to amount to a coming with strong hand, and a disturbance of the public peace of the neighbourhood. It is only on that ground that you can find her guilty.

Not guilty.

Archbold for the prosecution.

Platt and *C. Phillips* for the defendants *Scholefield* and *Goddard*.

Cockburn for the defendants *Smyth* and *Finney*.

Considerable doubt was expressed by Lord *Kenyon* in *R. v. Wilson*, 8 T. R. 364. as to the position of Mr. Serjt. *Hawkins*, that at common law a party may enter with force into that to which he has a legal title; and it is to be observed, that the case in *Moore*, on which the position principally depends, proceeded on the ground that the occupier there was a mere servant to the owner, and the possession therefore never out of the owner, and that the entry, being made by his command, was no trespass against him. And the whole question was argued as to the rights of the Earl of *Nottingham* as owner, and Lady *Russell* as keeper of the castle, and not as to the public crime in the method of asserting those rights. The case in *Keble* turned on the question, what estates were within the statute 5 Ric. 2. and not on the common law duty. In *R. v. Wilson*, the learned Judges, especially Lord *Kenyon* and *Grose J.*, grounded their judgments mainly on the breach of the public peace, and not the violence to private property. It is certainly not of much importance, to treat a forcible entry on a man's property as a common-law offence, as, when committed by three persons or more, the breach of the public peace would in most cases be indictable as a riot. The offence of forcible entry, however, may be committed by one or two persons, so that the question is not quite immaterial.

It is laid down generally in the books (2 Bac. Abr. Forcible Entry, (B). 1 Russ. 288.) that "if divers do come in company, where their entry is not lawful, and all of them, saving one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they come in company to do an unlawful act; but it is otherwise where one had a right of entry, for then they only come to do a lawful act, and, therefore, it is the force of him only who used it." The latter proposition must necessarily be qualified, as in the present case, by the condition that they do not come to aid or protect the unlawful mode of doing the lawful act.

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WESTMINSTER,
Feb. 3.

REX on the Prosecution of SMYTH v. BIRNIE, Knight, and Others.

A magistrate has no right to detain a known person to answer a charge of misdemeanour verbally intimated to him, but without a regular information.

INDICTMENT for assaulting and imprisoning the prosecutor.

It appeared that the prosecutor had attended at the public office at *Bow Street*, to make a charge against certain parties, which was finally dismissed. After the dismissal, as the prosecutor (who was well known at the office) was about to quit the office, one of the magistrates ordered him to remain, as a charge was to be preferred against him for attempting to tamper with the administration of justice. This was a charge by *Goddard*, one of the defendants on the former charge, who accused Mr. *Smyth* of having endeavoured to bribe him to give information upon it. It appeared that *Goddard* had mentioned this to the magistrates before, but had not at that period made any regular charge. Mr. *Smyth* required to be allowed to quit the office, but was forcibly detained for about twenty minutes, when the charge having been regularly made, the magistrates thought it did not amount to a crime, and the prosecutor was allowed to go away. The defendants respectively were the magistrates who ordered, and the officers who enforced this detention.

Adolphus, for the defendants, contended that the detention was not illegal. The magistrates had been apprised of a charge against the prosecutor,

although from press of business they had not been at leisure to receive it regularly. They were therefore justified, as he happened to be before them, in detaining him for a reasonable time to answer it; and they did no more. They investigated it immediately, and finding it untenable, at once dismissed him. If a party might not be detained in this manner, many offenders would escape entirely; for if they once quitted the office, there would be no means of finding them afterwards.

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Lord TENTERDEN C. J. This is not like the case suggested of a mere vagabond, who, if he were allowed once to depart from the presence of the magistrate, may probably never be seen again: the prosecutor was a person well known at the office, and whatever might be allowable in the case put, I am of opinion that, under the circumstances of the present case, the detention of the prosecutor was not justified. It is clear that, whatever intimation the principal defendants might have had that a charge was likely to be preferred, there was no information laid before them in their capacity of magistrates at the time of the prosecutor's detention. I think that a magistrate is not at liberty to detain a known person to answer a charge not yet made against him: he ought to have an information regularly before him, that he may be able to judge whether it charges any offence to which the party ought to answer.

Guilty.

Archbold for the prosecution.

Adolphus for the defendants.

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WESTMINSTER,
Feb. 9.

ARCHBOLD, Esquire, v. SWEET.

An author may maintain an action for injury to his reputation, against the publisher of an inaccurate edition of his work falsely purporting to be executed by him, though the publisher be the owner of the copyright.

ACTION on the case.

The declaration stated that the plaintiff was a barrister at law, and the author of a book called “A Summary of the Law relative to Pleading and Evidence in Criminal Cases,” of which two editions had been published; that he afterwards sold the copyright of that work to the defendant; that the defendant published a third edition of the same work as and for, and purporting to be edited by the plaintiff; that such third edition contained many errors and inaccuracies in law and reasoning, whereby and by reason of the same being published as and for an edition by the plaintiff, he, the plaintiff, was damaged in his reputation, &c.

Sir *James Scarlett*, for the defendant, contended that the action could not be maintained without proof of express malice. It is alleged in the declaration that the defendant had purchased the copyright; he had therefore a right to publish a new edition, with such alterations as the alterations in the law might render necessary. I do not say that if he were willing to injure his own property for the purpose of damaging the plaintiff's reputation an action might not be maintained against him; but, as he has done no more than he had *primâ facie* a right to do, the plaintiff cannot recover unless he show an intention to injure him.

Campbell for the plaintiff. There is no such distinction as that suggested on the part of the defendant. The general rule is, that any representation which is untrue, and mischievous to another person, is actionable. Thus, in a recent case in K. B. a party who had untruly represented himself to be authorized to accept a bill of exchange by procuration was held liable to make good injury accruing to a remote indorsee by reason of such mis-statement, although the jury expressly negatived fraud or malice in the defendant. (a) And the same doctrine was acted on in the House of Lords in a recent case from *Ireland*.

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 v.
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Lord TENTERDEN C. J. That case proceeded on the ground that it was a representation made to the sheriff, and upon which he was bound to act.

Sir *James Scarlett*. The cases cited are not like the present one. That in the House of Lords has already received an answer; that in the K. B. was unlike the present case; because there, there was a direct affirmation that the party had authority to accept the bill, and this travelled with the bill, and gave every holder a right of action for the false affirmation on the faith of which he had taken it.

Lord TENTERDEN C. J. I do not think I ought to stop the case: the defendant must move to enter a nonsuit. The nearest resemblance to the present case seems to me to be furnished by those

(a) *Polhill v. Walter*, 3 B. & Ad. 114.

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cases in which a person, having a reputation for the manufacture of a particular commodity, but not protected by a patent, brings an action against another for selling an inferior article in his name. The cases are not exactly alike : there the sale of the commodity is affected, here the character of the author. But they bear a close analogy to each other ; and, as at present advised, I cannot say that this action is not maintainable.

It appeared in evidence that application had been made by the defendant to the plaintiff to edit the third edition of the work in question, but that he had refused, and that another gentleman had then undertaken to do so, but had refused to allow his name to be put to the edition. The title-page of the second edition was as follows : —

A SUMMARY, &c.

SECOND EDITION,
 WITH VERY CONSIDERABLE ADDITIONS AND
 ALTERATIONS.

By J. F. ARCHBOLD, Esq.

The title-page of the third edition was in the following form : —

A SUMMARY, &c.

By J. F. ARCHBOLD, Esq.

THIRD EDITION,
 WITH VERY CONSIDERABLE ADDITIONS.

The second edition contained an advertisement to that edition, and a reprint of the preface to the first edition ; each written in the first person, and

signed with the plaintiff's initials, *J. F. A.* and his residence. These were reprinted in the same form for the third edition, and an advertisement to that edition was prefixed, written in the third person, and without any signature or residence.

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Several law booksellers were called, who said that they should understand from the form of the title-page of the third edition, and the difference in the composition of the advertisement to that edition and of those reprinted from the former ones, that the third edition was not edited by *Mr. Archbold*. It was also proved that the fact, that it was not so, was communicated by the defendant to the trade, and also to many of his own retail customers.

Lord TENTERDEN C. J., in summing up, after observing that the inaccuracies were such, that if attributed to the plaintiff they would be prejudicial to his character, said, that the question for the jury would be, whether the third edition professed to be the work of the plaintiff. No blame is to be attached to the defendant for publishing the edition without the plaintiff's concurrence, for the plaintiff had refused to take any part in it; but if he published it as the plaintiff's, he will be liable in this action, as the mode of execution would certainly be injurious to *Mr. Archbold's* reputation. In looking to that question, the evidence given is material, but it is not conclusive. The proof of information given to customers and law booksellers is of ambiguous effect: it tends to show that the defendant did not intend that the edition should pass for the work of the plaintiff;

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but, on the other hand, it tends to invalidate the evidence given that it would not be so understood, by showing that the defendant did not rely on the mere internal evidence as sufficient. Several law booksellers, indeed, say that they should have understood the edition not to have been superintended by the plaintiff; but this, though material evidence, does not decide the question; for it is not the opinion of the trade only in which the plaintiff might suffer. I myself, looking at the title-page only, should certainly have understood the third edition to proceed from the plaintiff; perhaps if I had looked further, and examined the form of the advertisement, I should have formed a different opinion. The question, however, is for the jury, whether the third edition, in the form in which it is put forth, would be understood by purchasers to be by the plaintiff: if purchasers who paid reasonable attention to its contents would not so understand it, the verdict must be for the defendant; if they would, for the plaintiff.

Verdict for the plaintiff.

Campbell and *Follett* for the plaintiff.

Sir J. Scarlett and *Lee* for the defendant.

1832.

ADJOURNED SITTINGS IN LONDON.

PERCIVAL *v.* ALCOCK.

GUILDHALL,
Feb. 15.

DEBT on simple contract.

The cause was undefended, and the plaintiff obtained a verdict.

F. Kelly, for the plaintiff, applied for immediate execution.

PARKE J. I understand that Lord *Tenterden* has refused such applications in actions of debt on simple contract; and I shall follow that authority. (*a*) The plaintiff chooses that form of action because he gets final judgment at once on a default; and I shall not accelerate his execution.

The Court will not certify under stat. 1 W. 4. c. 7. s. 2. that execution ought to issue immediately in an action of debt on simple contract.

F. Kelly for the plaintiff.

(*a*) See *ante*, 93. *Fisher v. Davies*; but see *infra*, where after consultation with *Bolland B.* a different practice was adopted.

In another case, the same day, a verdict was taken by consent, and application was made on the part of the plaintiff for immediate execution, the action being brought in *assumpsit* for a common debt.

Platt, for the defendant, objected, as no consent had been given with respect to the time of the execution.

In an action of *assumpsit* for a common debt, the Court will certify for immediate execution, though the verdict be taken by consent, and the consent does not contain any such terms.

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v.

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PARKE J. however certified for execution in a fortnight, saying that he thought the general object of the statute was to accelerate execution for all debts where there was really no doubt on the claim for the sum recovered.

GUILDHALL,
Feb. 22.

COLEMAN v. GIBSON.

A party to whom goods to the amount of 10*l.* and upwards are delivered, subject to approval under a parol order, must refuse to accept them in a reasonable time; if he does not, he is to be treated as having accepted them.

ASSUMPSIT for goods sold and delivered, work and labour, &c.

The action was brought for 18*l.*, the price of four vats ordered verbally by the defendant from the plaintiff. An order for five was given on the 6th of *January*, and one of the vats was delivered according to the order at Messrs. *Seager and Evans*, distillers, on the 11th, another on the 19th, and two more on the 24th. On the *Wednesday* following (*January* 26th) the defendant went to the plaintiff and refused to take the casks, and the fifth was accordingly not delivered. The defendant had seen them on the 19th, and expressed no dissatisfaction with them, but ordered the plaintiff to proceed. The refusal was on the ground of bad quality, and that they leaked. As to this there was contradictory evidence. It appeared that it was usual to send goods of this kind to distillers to be seasoned, as had been done in this instance. The vats were never returned.

Williams for the defendant, contended, that the defendant could not be charged with these goods,

there being only a parol order, and no acceptance. The stat. 9 G. 4. c. 14. s. 7. has extended the provisions of the statute of frauds to such a case as the present. The plaintiff, therefore, must shew an acceptance, and this must not be a taking them merely for trial, with a right still to object to them as not merchantable. Here, though they were delivered according to the order of the defendant, it was with a view to ascertaining their quality, and he still had a right to refuse them: the mere fact, therefore, that they were not actually returned, but continued on the premises of Messrs. *Seager*, will not convert this into an acceptance. In fact he did complain of their quality, and refuse them. That the mere fact of the receipt of the goods by a party named by the buyer, does not amount to an acceptance of them by him, is clear from *Howe v. Palmer*, 3 B. & A. 321., *Hanson v. Armitage*, 5 B. & A. 557., and *Astey v. Emery*, 4 M. & S. 262.: in the former of which it was expressly laid down that there could be no actual acceptance so long as the buyer continued to have a right to object either to the quantum or quality of the goods.

LORD TENTERDEN C. J. The defendant is bound to object to receive the casks within a reasonable time: and it will be a question for the jury whether he did so. It appears that it is usual for articles of this kind to be sent to a distiller's, as in this case, to be seasoned before they are taken to the publican's. This would give the defendant an opportunity of ascertaining the quality of the goods, and he would be entitled to time for this

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COLEMAN

v.

GIBSON.

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purpose. But allowing him this, he must determine in a reasonable time; and if he lets it elapse without objection, I think he must be considered as having accepted. The refusal in this case was certainly made soon after the delivery of the last two casks, and the question may perhaps be different as to them and as to those delivered before: they are to be treated in this respect as separate items. The jury will have to consider whether the defendant signified his objection to all or any of the casks in a reasonable time: for all which were not so objected to the plaintiff will be entitled to a verdict, unless the jury should be of opinion that the casks were really unfit for use. If they were, they are no compliance with the order.

Verdict for the plaintiff for the whole amount.

F. Pollock and *Hayes* for the plaintiff.

Williams and *H. Jones* for the defendant.

1832.

FRIEDLANDER *v.* The LONDON Assurance Company.GUILDHALL,
Feb. 27.

COVENANT on a policy of assurance against fire on goods described in the policy (which was set out in the declaration) to be in the dwelling-house of the plaintiff.

There was a plea, that the dwelling-house was not truly and accurately described.

Another plea alleged, that the plaintiff did not truly and accurately describe the said house, so that the nature and degree of the risk to which the goods were exposed might be justly estimated.

It appeared that the plaintiff occupied but one room, and that as a lodger only.

Sir *J. Scarlett*, *Campbell*, and *F. Kelly*. This supports the pleas, for the house proved is not the dwelling-house of the plaintiff, and the fact is important within the words of the plea; for the risk to which goods are subjected is materially increased by the fact that the main body of the house is occupied by those over whom the plaintiff has no controul.

Goods insured were described in the policy to be in the dwelling-house of the insured. The insured had only one room, as a lodger, in which the goods were: Held, correctly described within a condition, that "the houses, buildings, or other places where goods are deposited and kept, shall be truly and accurately described;" such condition relating to the construction of the house, and not to the interest of the parties in it.

Denman A. G. contrd. There is no reason for saying that the risk could not be as well ascertained as it would be if the plaintiff's occupation were described as merely that of a lodger. If the plea had said that the plaintiff's interest in

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Assurance
Company.

the house was not described, this evidence might have supported it. But the plaintiff's dwelling-house means the house in which plaintiff dwells, unless the policy add as a condition that the interest should be described. (a)

Lord TENTERDEN C. J. It seems to me that the description of the house required by the policy, and put in issue by the plea, is whether it be of brick, slated, tiled, thatched, and so forth; and therefore that these pleas are not supported.

Verdict for the defendants.

In the following term the plaintiff obtained a rule on another point for a new trial, which has since been made absolute.

Denman, Attorney-General, *Holt*, and *Bere* for the plaintiff.

Sir *J. Scarlett*, *Campbell*, and *F. Kelly* for the defendants.

(a) The conditions required that the houses and buildings, or other places where goods are deposited and kept, shall be truly and accurately described; and provided, that if houses and goods were insured without having been truly and accurately described, so that the nature and degree of the risk to which they might be exposed might be justly estimated, the policy thereon should be void.

These conditions were set out in the declaration.

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ADJOURNED SITTINGS AT WESTMINSTER,
IN THE COMMON PLEAS.

HARRIS v. JONES.

WESTMINSTER,
Feb. 3.

THIS was an action brought by lessor against lessee on a covenant to repair contained in a lease, by which plaintiff demised a messuage to the defendant for six years, from the 29th of *September* 1824. Rent, fifty guineas per annum.

A general covenant to repair, is satisfied by the lessee keeping the premises in *substantial* repair; a literal performance of the covenant is not to be required.

The words of the covenant were, that “ he, (the defendant,) his executors, &c. should and would, at his and their costs and charges, at all times during the term, well and sufficiently repair, uphold, support, amend, pave, &c., and keep the premises with the appurtenances, and all roofs, walls, party-walls, sewers, &c. &c., and all doors, locks, &c., marble and other chimney pieces, slabs, coverings, glazed, and sash windows, shutters, &c., rails and all and every improvement, fixtures, articles, and things which then were or at any time during the term should be fixed, &c., *by and with all and all manner of needful and necessary reparations, cleansings, and amendments whatsoever*; and the said premises, with the appurtenances, and all the said fixtures, articles, and things so being well and sufficiently repaired, upheld, supported, and paved, cleansed, painted, emptied, and kept, should and would, at the expiration of the said term, yield and deliver up to the said plaintiff, his

Where the jury have incorrectly, and contrary to the Judge's direction, found for the defendant, the Court will not grant a new trial to enable the plaintiff to recover nominal damages only.

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executors, administrators, and assigns, *in good and substantial repair and condition.*” There was also a covenant for painting the outside of the wood and iron-work every third year, and the inside in the fifth year of the term.

The breaches assigned were, first, that the defendant, during the term, and until the determination thereof, suffered and permitted the premises, with the appurtenances, and the roofs, walls, &c. (following the words of the covenant), and the improvements, fixtures, articles and things during the term fixed, &c., to continue, and the same were ruinous, prostrate, fallen, in bad order, repair, and condition, and in great decay for want of needful, &c. repairing, &c.—and that the defendant, at the expiration of the term, left the premises so as last aforesaid, ruinous, prostrate, &c. and in bad order, &c. and in great decay. Second breach, that defendant did not paint the outside wood and iron-work every third year, nor the inside in the fifth year.

Pleas, traversing the breaches.

The defendant began, and gave general evidence, that from time to time during the term he laid out money in repairing the house; he also called general evidence to shew, that the premises were in better repair at the end of the term than at the beginning; and that at the end of the term they were, in what some of the witnesses called, “tenantable repair.”

The plaintiff, on the other hand, called witnesses, who said the premises were not in good repair, and pointed out specific instances of want of repair in different parts of the premises. The instances given (separately taken) were not of any

considerable importance, (such as the non-repair of a skylight, the glass of which was broken, and which the witness swore it would cost 40s. to put in repair, — also some iron rails, tiling and coping, &c.;) the whole sum sought to be recovered was about 20%.

There was no evidence of the painting in the fifth year.

TINDAL C. J. told the jury, the question for them was, whether the covenants had been really and substantially complied with? for that, in cases of this nature, it was hardly to be expected that a strict and literal performance of so general a covenant (unless where the language pointed to any particular matter) could be proved. The words at the end of the latter member of the covenant (as to yielding up the premises at the end of the term “in good and substantial repair and condition”) were to be taken as giving a clue to the meaning of the general words. The defendant was only bound to keep up the house as an old house, not to give the plaintiff the benefit of new work; and, upon the whole, the jury were to say, whether the particulars of non-repair enumerated by the plaintiff’s witnesses, were dilapidations amounting to a substantial breach of the covenant; as to the other breach of covenant (for not painting the inside in the fifth year), the plaintiff was entitled to nominal damages.

• Verdict for defendant.

Ludlow Serjt. and *F. Robinson* for the plaintiff.

Wilde Serjt. for the defendant.

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v.

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In the following term *Ludlow* Serjt. obtained a rule *nisi* for a new trial, on the ground that the verdict was against evidence, or else for leave to enter the verdict for the plaintiff with nominal damages, contending that the plaintiff was, at all events, clearly entitled to a verdict on the covenant, for not painting the inside of the house in the *fifth year*. *Wilde* Serjt. afterwards shewed cause, and *Ludlow* was heard in support of his rule.

As to the breach for not repairing, the Chief Justice repeated the observations he had made at the trial; and as to the other breach (for not painting in the fifth year), the Chief Justice said, that in his opinion the plaintiff was only entitled to nominal damages, and had the jury given nominal damages, he should at the trial have certified under the statute of *Elizabeth*; he still entertained the same opinion of the case. The rule must therefore apply, according to which the Court is not in the habit of interfering when the damages are below 20*l.*, unless in the case of a misdirection on the part of the Judge. The rest of the Court concurring, the rule was

Discharged.

SPRING ASSIZES, 2 W. IV.

TAUNTON.
Coram PARK J.

REX v. RICHARDS.

TAUNTON,
March 30.

THE prisoner and two others were indicted, for that they, “of the parish of *Walcot*,” in the county of *Somerset*, being riotously and tumultuously assembled, at the parish of *St. Peter* and *St. Paul*, in the city of *Bath*, did then and there, feloniously and with force, begin to demolish, pull down, and destroy a certain house of *John Cooper* and *Wm. Bishop*, “situate at the parish aforesaid.”

In an indictment alleging a dwelling-house to be “situate at the parish aforesaid,” the parish last mentioned must be intended.

It appeared that the house which the prisoners had begun to demolish was situate in the parish of *St. Peter* and *St. Paul*; but it was objected by *Rogers*, for the prisoners, that the parish was not properly laid, because two parishes had been previously named, and the indictment did not allege (as it ought to have done) that the house was in the parish last aforesaid. He cited as an authority, 1 Ro. Rep. 223.

On the part of the crown it was urged, that the objection, if of any weight, ought to have been the subject of demurrer, as it was only an ambiguity; and for this was cited *Walford v. Anthony and Others*, 8 Bing. p. 75. It was also contended, that the words “parish aforesaid” referred to the

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parish of *St. Peter* and *St. Paul*, the *last antecedent* : and *R. v. St. Mary's, Leicester*, 1 B. & A. 327. was cited as decisive of the point.

PARK J., (after consulting with Mr. Justice *Gaselee*,) stated that the indictment, in his opinion, was sufficient, but still he thought it better to reserve the point.

His Lordship on a following day said, he had fully considered the point, and was of opinion that the parish aforesaid must relate to the last-mentioned parish, and that the indictment was therefore good ; and the jury having found the prisoners guilty, judgment of death was recorded against them.

Follett and *Bere* for the prosecutor.

Rogers for the defendant *Richards*.

Lord *Coke* (1 Inst. 20 *b.*) draws a distinction between the words "*idem*" and "*prædictus*," saying that the word "*idem*" always refers to the last antecedent, and implying (it would seem) that the word "*prædictus*" does not necessarily refer to the last antecedent. In *Morgan's* case, however, (Cro. Eliz. 100.) he argued (and the Court seems to have agreed with him) that the word *prædictus* has reference to the last antecedent. The general rule would seem to be, that the relative word shall have reference to the next preceding antecedent, unless the intent upon the whole deed appear to require a different construction. Com. Dig. tit. *Parols*, (A.) 14. See also *R. v. The Inhabitants of Countesthorpe* (2 B. & Adol. 487.).

R. v. Voke, Russ. & Ry. C. C. R. 33.

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LANCASTER.
Coram PATTESON, J.

REX v. BYKERDIKE.

LANCASTER,
March 13.

FIRST count of the indictment charged, that *R. Bykerdike*, with divers others, &c. did conspire, combine, confederate, and agree unlawfully to intimidate, prejudice, and oppress one *John Garforth* in his trade and occupation, as agent for a certain colliery, to wit, &c. *and to prevent the workmen of the said J. G. from continuing to work in the said colliery.*

An indictment for conspiring, &c. "to prevent the workmen of *J. G.* from continuing to work, &c." is supported by evidence of a conspiracy to prevent *any* from continuing, &c.

Second count laid a conspiracy to oppress and injure *Joseph Jones* and others, partners in a certain colliery, to wit, &c.; *and to prevent the workmen in the employ of the said J. J. and others, his partners, from continuing to work at the said colliery, and compel the said J. J. and others, his partners, to discharge the said workmen in their employ.*

A combination of workmen for the purpose of dictating to masters what workmen they shall employ, is indictable.

Jones was an owner of the *Fairbottom* colliery, *Garforth* was agent for the colliery. Seven colliers had been summoned before a magistrate by *Garforth* for refusing to work. It appeared that this was done at their own request, as they were afraid to work except under the appearance of being compelled to do so. The body of the other men met, having taken certain oaths, and agreed upon a letter addressed to *Garforth*, to the effect,

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that *all* workmen in *Garforth's* employ would "strike in fourteen days, unless the seven men were discharged from the colliery." The letter concluded, "By order of the board of directors for the body of coal miners. *Fairbottom Colliery.*"

Dr. *Browne*, for the defendant, argued that the indictment must be understood as charging a conspiracy to procure *all* the workmen to be discharged, which clearly was not supported by the facts. And that as to the earlier part of the indictment, the workmen were clearly justified in combining *among themselves* not to work since the late act 6 G. 4. c. 120.

Brandt and *Townshend*, for the prosecution, cited *R. v. Fergusson and Edge*, 2 Stark. N. P. 489. and *R. v. Horne*, Cowp. 680., shewing that an allegation as to "the workmen," was supported by proof as to some of the workmen. And, as to the statute, they argued that it did not protect a combination for such a purpose as this, but only for obtaining higher wages, regulating time, &c.

PATTESON J. told the jury, that a conspiracy to procure the discharge of any of the workmen would support the indictment, which did not necessarily lay the intent as to all the workmen: and, if it did, that it was still a question whether the facts would not have proved it as to *all*. Further, that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the

master whom he should employ ; and that this
compulsion was clearly illegal.

The defendant was convicted.

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Brandt and *Townshend* for the prosecution.

Dr. *Browne* for the defendant.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN K. B. AND EXCHEQUER,
AT THE SITTINGS AFTER
EASTER TERM,
2 W. IV. 1832.

ADJOURNED SITTINGS AT WESTMINSTER.

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WESTMINSTER,
May 14.

BAUGH v. CRADOCKE.

Where two parties in dispute have one attorney, a communication by one to him in his common capacity is not privileged, but may be used by the other.

THIS was an action by the indorsee against the acceptor of a bill of exchange for 60*l*.

The defence was, that the bill was given for the accommodation of *Shepherd*, the drawer, as a security for another debt due from *Shepherd* to the plaintiff, for which he had a *cognovit* for 142*l*. payable 20*l*. a month, and that it was agreed that the first three payments under the *cognovit* should be taken as payment of the bill; and that these had been paid. *Baugh*, the plaintiff, had sued *Shepherd* for the original debt, and when the *cognovit* was given, *Binns*, the attorney of *Shepherd*, became also the attorney for the plaintiff *Baugh* in that action, and had the management of his papers therein.

A letter was put in by the defendant from *Baugh* to *Binns* on the subject of one of the instalments, in which he pressed him as his attorney to get payment of the instalments, and complained of his backwardness from being also *Shepherd's* attorney; and the letter contained an offer alluding to the mode of payment of the bill.

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Moody, for the plaintiff, objected to this letter being read, inasmuch it was written to *Binns* in the character of attorney, and was therefore a privileged communication.

Sir *J. Scarlett*, *contra*. The letter contains an offer to be made to *Shepherd*, and therefore was intended to be used, and might be used for him.

PATTESON J. Yes. It is not a communication to him in the single character of plaintiff's attorney; I cannot shut it out from the other party.

Verdict for the defendant.

Moody for the plaintiff.

Sir *J. Scarlett* and *White* for the defendant.

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EXCHEQUER,
May 17.

RUDDICK v. SIMMONS.

Affidavits are
admissible in
support of an
application for
immediate
execution
under 1 W. 4.
c. 7. s. 2.

THIS was an undefended cause, and the plaintiff having obtained a verdict, *Sewel* applied for immediate execution, and stated that the defendant was making away with his property in order to defeat his creditors.

BAYLEY B. desired him to produce an affidavit of the facts.

It was suggested from the bar, that Lord *Lyndhurst* had refused to receive affidavits under the statute in a case reported. (*a*)

BAYLEY B. I think there may be cases in which justice may require them.

Sewel accordingly produced an affidavit of the facts, and his Lordship ordered execution in seven days.

Sewel for the plaintiff.

(*a*) *Suprà*, *Gervas v. Burtchley*, 150.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN K. B.

AT THE SITTINGS AFTER
TRINITY TERM,
2 W. IV. 1832.

ADJOURNED SITTINGS AT WESTMINSTER.

HARRISON v. HALL.

1832.

WESTMINSTER,
June 20.

ASSUMPSIT for work and labour, goods sold and delivered, money lent, and the usual counts.

The action was brought to recover some small sums for work done, and for goods sold to the defendant's wife. The wife was living apart from the defendant, with his consent, upon some allowance, but it was doubtful on the evidence to what amount; and it was clearly proved that the defendant had repeatedly cautioned the plaintiff not to trust his wife; but there was some evidence that the defendant, upon application for payment, had promised to pay the debt.

An express promise by a husband to pay a debt incurred by his wife, for which he is not otherwise liable, is binding.

Lord TENTERDEN C. J. in summing up said, that there were two questions for their consideration; first, Was the allowance sufficient for the main-

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tenance of the wife? If so, the defendant was not liable, although the things supplied were clearly suitable to the wife's condition, unless the husband had afterwards expressly promised to pay. If they were of opinion that after the supply, he had taken the debt on himself, and promised to pay it, the plaintiff was entitled to a verdict, even if the allowance was sufficient.

Verdict for plaintiff, 9*l.* (a)

Denman, Attorney-General, and *Comyn* for the plaintiff.

Platt for the defendant.

(a) This case ranges itself amongst those where the difficulty occurs, of supporting an express promise by a sufficient consideration. The husband and wife were living apart, — it is assumed that the latter had a sufficient maintenance from the husband; and it is allowed on all hands, that under such circumstances he is not liable by law to pay for goods supplied to the wife. It is not easy to see why an express promise to pay for them should not, under such circumstances, be treated as *nudum pactum*? (see *Arden and Others v. Tucker*, *infra*, 191.) Nor is the difficulty solved by alleging a moral obligation on the husband to pay; for it is not clear that a husband can be considered, even morally, answerable for the debts of his wife, contracted by her under the circumstances stated in the principal case.

There is another mode of proving the husband's liability, that is, by saying that his subsequent promise may be considered almost conclusive evidence against him, to shew that the maintenance was not sufficient; that sufficiency depending partly upon the extent of the husband's property, and upon other circumstances which lie very much within his own knowledge. It is in this way that Lord *Ellenborough* appears to have put the case in *Hornbuckle v. Hornbury*, 2 *Stark. Rep.* 177., where that learned Judge directed the jury substantially to the same effect as Lord *Tenterden* did in the principal case.

BECKFORD v. CRUTWELL.

WESTMINSTER,
June 21.

THIS was an action of *assumpsit* to recover damages for the loss of a parcel alleged to have been received by the defendant to be carried from *London* to *Bath*. The contract being alleged to be made at *Westminster*.

An averment of a contract to carry goods from London to Bath, is supported by evidence of a contract to carry from Westminster to Bath: London must be taken in the enlarged and popular, not limited sense.

The parcel was delivered and booked at the defendant's office, *White Horse Cellar, Piccadilly*.

Campbell submitted that the plaintiff must be nonsuited, on the ground of a variance in the contract proved, and that alleged: — that *Piccadilly* was in *Middlesex*, not *London*, and he cited *Tucker v. Crackle*, 2 Star. 385.

LORD TENTERDEN. I think the term *London* must be understood in its enlarged sense, and includes *Westminster*.

REX v. HOWARD.

WESTMINSTER,
June 28.

INDICTMENT for perjury committed in an affidavit made in the Court of K.B., on a taxation of costs. The indictment set out the affidavit of *J. Garth*, is admissible without proof of the commission; proof of the commissioner's acting as such is sufficient.

An affidavit purporting to be sworn before a public commissioner,

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to which that of the defendant, on which perjury was assigned, was an answer.

To prove this a paper, purporting to be the affidavit of *J. Garth*, made before *Chell*, a commissioner, &c., was offered.

It was proved that *Chell* acted as special commissioner for taking the affidavits of parties in prison, or unable from sickness to attend before a Judge.

The handwritings of *Chell* and *Garth* were proved.

It was objected by *Scarlett* that the affidavit was not admissible without showing the commission under which it was taken. Before the statute 23 G. 2. c. 11. s. 1., in indictments for perjury it was necessary to allege the jurisdiction. This was a mere collateral proceeding, and the statute did not apply.

Campbell. It is not necessary to prove the commission any more than it is necessary to prove the commission of Judge of Assize in *Nisi Prius*. Public officers must be taken to have authority to execute their offices.

PATTESON J. I do not understand Mr. *Campbell* to put his answer upon the statute, but upon the general principle that a person acting as public officer must be taken to have authority as such, and I think a commissioner for taking affidavits comes within that principle, and, therefore, that it is not necessary to prove his authority. I must therefore take it that somebody swore this affidavit

before him. Then as to this person being *J. Garth*, that is proved by his handwriting.

The defendant was acquitted.

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 HOWARD.

Campbell and Platt for the Plaintiff.

Sir *J. Scarlett* for the defendant.

ADJOURNED SITTINGS IN LONDON.

CORBOULD, Assignee of WARD, an Insolvent Debtor, v. BROADHURST.

GUILDHALL,
 July 9.

TROVER for goods of the insolvent.

The evidence for the plaintiff showed that *Ward*, who was a higler in coals, being in insolvent circumstances, transferred his horse and cart to the defendant, who was his creditor, within three months before the commencement of his imprisonment. For the defendant it was proved that the insolvent, being in his debt, he applied to him for payment, personally and by an agent, several times, and threatened to arrest him, and to take his horse and cart, if he did not pay. Upon these facts it was contended for the plaintiff, that the transfer was a *voluntary* one within the meaning of stat. 7 G. 4. c. 57. s. 32.; that the word "*voluntarily*" was, for the first time, used in that section as forming a part of the description of the transactions inhibited by the legislature, and that the assignees of an insolvent debtor were entitled to set aside all transfers like the present, though made under apprehension of an arrest, as being

A transfer made by a debtor under apprehension of arrest, is not fraudulent and void as *voluntary* under (the Insolvent Debtors' Act) 7 G. 4. c. 57. s. 32.

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voluntary within the meaning of that statute, the obvious intent of which was to vest an equal interest (as amongst themselves) in all the creditors of an insolvent for three months before the commencement of his imprisonment.

Lord TENTERDEN C. J. Adverting to the construction which has prevailed in cases of bankruptcy(*a*), where the importunity of a creditor has prevented transactions from amounting to a fraudulent preference, I am of opinion that the legislature must be understood to have used the word “*voluntarily*” here with the same intention. As it is admitted that the evidence shows the transfer was made under apprehension of arrest, I think the plaintiff must be called.

Plaintiff nonsuited.

Denman, Attorney-General, and *White* for the plaintiff.

Gurney and *Herbert Jones* for the defendant.

(*a*) *Thomson v. Freeman*, 1 D. & R. 155. *Hartshorn v. Slodden*, 2 Bos. & Pul. 582. *Bailey v. Ballard*, 1 Campb. 416. *Crosby v. Crouch*, 2 Campb. 166. 11 East, 256. S. C.

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ARDEN and Two Others v. TUCKER.

GUILDHALL,
July 7.

ASSUMPSIT to recover the amount of an attorney's bill, for business done in the Palace Court.

Evidence was given that the three plaintiffs were in partnership together as attorneys; that a bill of costs, signed by all three plaintiffs, had been delivered to the defendant; that a difference arising between the parties, the plaintiffs had made an offer to take 20*l.* in full, whereupon the defendant said he would pay 15*l.*, which the plaintiffs refused to accept.

For the defendant it was proved, that only one of the plaintiffs (*viz. Arden*) was an admitted attorney of the Palace Court: the other two plaintiffs not being admitted on the rolls of the Court. *Arden* alone was named in the warrant to prosecute, and the rule of the Palace Court for taxing the bill of costs, ordered the bill of costs "of *Mr. Arden*" to be referred for taxation.

Where several attorneys were in partnership, but one of them only had been admitted on the rolls of the Palace Court: Held, that an action could not be sustained by all the partners for business done in that Court; although there had been an express promise to pay them.

Campbell, for the defendant, submitted that, under these circumstances, the present action could not be supported, and he cited *Brandon and Another v. Hubbard* (a); he relied also upon *Collins v. Godefroy* (b), as an authority to show that the defendant, being under no legal liability to the joint plaintiffs, the promise which he had made to

(a) 4 B. M. 367.

(b) 1 B. & Adol. 950.

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pay them was *nudum pactum*, and did not alter his situation.

Sir *J. Scarlett*, *contra*, endeavoured to distinguish the present case from *Brandon v. Hubbard*, urging that, in that case, the plaintiff *Brandon* had been employed, not as an attorney, but as a *replevin clerk* to the sheriff, and that, in the business of a replevin clerk, there was no pretence for saying there was any partnership between *Brandon* and the other plaintiff. As to the superior courts, it is true that statutes have been passed expressly prohibiting an unadmitted person from practising under the name of an attorney admitted on the rolls; but there is no such statute as to this Court. He also submitted, that, at all events, the plaintiffs were entitled to a verdict for the sum which the defendant had expressly offered to pay.

Lord TENTERDEN C. J. was clearly of opinion that the plaintiffs could not recover, and directed a
Nonsuit.

Practice.

Where a defendant relies upon a legal objection, and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply.

In this case a question arose as to the defendant's right to reply.

Campbell, for the defendant, opened for a nonsuit, citing the cases above mentioned, and then called witnesses to establish the facts.

Sir *J. Scarlett* thereupon replied, contending (as before mentioned) that the plaintiff was entitled to a verdict; and upon *Campbell's* rising to answer the arguments of Sir *J. Scarlett*, the latter insisted

that he was entitled to the last word, and that, as he had called no evidence in reply, the defendant's counsel could not again be heard.

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Lord TENTERDEN ruled that the defendant, having raised the objection, which was one of law, and the plaintiff having answered that objection, the defendant's counsel was entitled to be heard, upon the matter of law, in reply.

Sir J. Scarlett, Platt, and White for the plaintiffs.

Campbell and Lloyd for the defendant.

WHITWORTH v. SMITH, SHEW, BAYNHAM, FOSTER and Others.

GUILDHALL,
July 7.

ACTION on the case. The declaration contained counts for an excessive distress, — for distraining for more rent than was due, — for selling without an appraisement, — for not leaving the overplus in the hands of the sheriff or constable, — and also a count in trover.

The plaintiff was tenant to the Defendant *Baynham*, of apartments in a house at 28*l.* per annum, payable quarterly. It appeared by the evidence, that at *Christmas* 1831, 8*l.* 8*s.* was due from the plaintiff for a balance of rent; and in *February* following, *Baynham*, with *Smith* and *Shew*, seized goods, amounting in value to 219*l.* or thereabouts.

Trover is not maintainable for goods merely seized, as a distress, excessive in quantity. An auctioneer receiving for the purpose of sale from the distrainer, goods so seized, who returns them, is not answerable in trover; although, while the goods were with him, he had notice

that the distress was illegal, and refused to deliver them to the owner.

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Smith was a broker, and *Shew* an auctioneer and appraiser. There was proof of a notice of the distress having been given ; but the goods were placed by the defendants, *Baynham*, *Smith* and *Shew*, in a room in the house and locked up, and three days after the distress, were removed to the premises of the defendant *Foster* (an auctioneer) for sale ; and he advertised them for sale in his printed catalogue. Notice was given to *Foster* by the plaintiff, that the distress was illegal, and a demand was made of the goods, when he refused to deliver them ; it appeared, however, that he did not proceed to a sale, but they were afterwards taken away and sold with the rest, by the person who had originally left them at *Foster's*.

Barstow, for the defendant *Foster*, submitted that there was no evidence to affect him with any of the misconduct chargeable upon the original seizure, or subsequent sale ; he could not, therefore, be subject to a verdict on any of the special counts. And as the distress was a valid distress at common law, there being a tenancy and rent due, trover would not lie for the goods, although the distress were excessive. The want of notice of the distress did not invalidate the distress at common law, and even by statute notice is only required where the distrainer proceeds to sale ; and *Wallace v. King*, 1 H. Black. 13., was cited.

Dodd for the plaintiff. *Wallace v. King* merely decided, that since the statute, trover would not lie for an *irregular* distress. The nineteenth section of the statute 11 G. 2. solely applies to *irregularities*

distraint, and does not affect the case of an excessive distress; the statute applies in terms only to cases where "rent is justly due;" here, the rent distrained for was not due, the rent in arrears being only eight guineas, while the value of the goods seized was 219*l*. *Foster* could have no better title to detain these goods when demanded of him, than the other defendants from whom he received them; and *they* could not acquire any right by a distress illegal by reason of the excess.

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 OTHERS.

LORD TENTERDEN C. J. In the absence of any express authority, I think trover does not lie for the goods, there having been some rent due when the distress was made, though the distress was excessive. A distinction is attempted to be drawn between this case and *Wallace v. King*, on the ground that *there* the whole of the rent distrained for was actually due. There certainly is that distinction, but I think the words of the stat. 11 G. 2. are satisfied, if any rent is due at the time of the seizure. I shall therefore direct the jury to acquit *Foster*.

Verdict for defendant *Foster* accordingly,
 and for the plaintiff against the other
 defendants, damages 219*l*.

Dodd for the plaintiff.

Barstow for the defendant *Foster*.

Platt and *Ball* for the other defendants.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN C. P.

AT THE SITTINGS AFTER
TRINITY TERM,
3 W. IV. 1832.

ADJOURNED SITTINGS IN LONDON.

1832.

GUILDHALL,
July 12.

ELTON v. LARKINS.

An agreement by the attorneys to admit on the trial of a cause the execution of an instrument, is evidence on every trial of the cause, though not renewed after the first trial.

ACTION on a policy of insurance.

This was a second trial, the plaintiff having, on a former occasion, obtained a verdict which was set aside by the Court. At the former trial, the policy was admitted by the attorneys in the following form : —

“ It is agreed to admit on the trial of this cause, the execution of the policy,” &c.

On the present occasion, the plaintiffs relied on this admission as proof of the policy. This was objected to by *Spankie* Serjt. for the defendant, who contended that the admission was for the purpose of the former trial only ; admissions being

often made contrary to the fact to raise a point of law.

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Wilde Serjt. and *Maule*. It is an admission by the party binding him on all occasions; admissions before arbitrators are often given in evidence. In *Van Wart v. Woolley*, R. & M. 5., a special case agreed on by counsel on a former trial was admitted as evidence of the facts of the case.

TINDAL C. J. I think the expression, "it is agreed to admit on the trial," applies to every trial which may take place by direction of the Court, but I will save the point.

Verdict for the plaintiff.

Wilde Serjt. and *Maule* for the plaintiff.

Spankie Serjt. and *Barnewall* for the defendant.

RIDLEY and Others, Assignees of WHITE,
v. GYDE.

GUILDHALL,
July 13.

TROVER.

A witness who had been examined before the commissioners in the bankruptcy, was asked in cross-examination whether he had mentioned a fact, now stated by him, before the commissioners.

A witness on cross-examination may admit not having mentioned a fact on a former examination, though that examination is in writing, and not produced.

This was objected to by *Wilde* Serjt. for the plaintiffs, on the ground of the examination being

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 RIDLEY and
 OTHERS
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 GYDE.

in writing, and that it ought to be put into the witness's hand in the first place, or proved by the opposite side as their case.

TINDAL C. J. The object is to show he did not mention the fact. He may admit that if he chooses. It is his own business; and if he does not ask for the examination to refresh his memory, he may answer without it if he chooses.

Verdict for the plaintiffs.

Wilde Serjt. and *Cresswell* for the plaintiffs.

Jones Serjt. and *Talfourd* for the defendant.

SUMMER CIRCUIT, 3 W. IV.

EXETER.

Coram TAUNTON J.

August 3.

BLAKE v. PILFOLD.

A letter written by a private individual to a public officer, complaining of the misconduct of a person under him, is not

privileged from disclosure as an official communication.

But if made *bonâ fide* and without malice, such communication is not actionable as libellous, though some of the charges may not be true.

CASE for a libel on the plaintiff in his situation of guard of the *Exeter* mail, by reason of the publication of which he was dismissed from that situation. Pleas, not guilty, and a justification alleging the truth of the libel.

The libel complained of, was a letter written and directed to Sir *Francis Freeling*, chief secretary to His Majesty's postmaster-general, by the defendant, complaining of some misconduct of the plaintiff towards the defendant's wife in a journey by the mail. The defendant was unconnected with the post-office.

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 BLAKE
 v.
 PILFOLD.

On the handwriting of the letter being proved, *Follett* proposed to have it read. This was objected to by *Coleridge* for the defendant, on the ground that it was a privileged communication made to a public officer, and that such public officer ought not to be allowed to produce it; and he cited *Home v. Bentinck*, 2 B. & B. 130.; *Wyatt v. Gore*, Holt, 299., 1 Starkie Evid. 106.

TAUNTON J. I am clearly of opinion that this case does not fall within those cited. They are all cases of communications made by and between ministers and officers of the government, and in the course of the discharge of a public duty by the person making the communication. Here the letter is written by a private individual, having no public duty in writing it. If this were held within the privilege, any person might make the most malicious and most unfounded complaints with impunity, provided he took care to direct his letter to a public officer.

The letter was then read, and evidence was given by the defendant to prove the plea of justification.

In summing up, TAUNTON J., after going over the evidence, and observing that there was no evi-

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dence to support the special pleas, except those which were confined to the charge of drunkenness, and that upon that point the evidence was contradictory, said, You must consider the evidence offered by the defendant with reference to the issue raised on the plea of not guilty. Generally, where one man publishes libellous matter of another, the law will presume malice in the writer, and the plaintiff will be enabled to recover, without giving any proof of a malicious motive in the defendant. But there are certain cases in which communications are (what the law terms) privileged, and where the occasion on which the communication is made rebuts the inference of malice. In such a case a plaintiff cannot support an action for the publication of the matters so communicated, without giving evidence from which a jury may come to the conclusion that the defendant was actuated by malicious motives. I allude to the occasions where a man, on being applied to, gives a character of a servant, or where he gives confidential advice, or where the occasion of the communication is such as *primâ facie* affords an excuse for making it. In all these cases a plaintiff must give evidence of express malice. And I am of opinion that, in contemplation of law, the present is an occasion in which the letter would be excusable if the defendant was actuated by no malicious motive. This communication, then, if founded on facts stated by Mrs. P. to her husband, and made in good faith, with a belief of its truth,—not an idle or groundless belief, but one for which there was reasonable and probable cause,—would be justifiable, although it might ultimately turn out that some of the facts were not strictly

true. But if the letter was written by the defendant without a reasonable and probable cause, — without proper caution, and a well-founded belief of the facts communicated, — or if the statement be overcharged and exaggerated, or the facts distorted, — these circumstances would be indications of malice, and would render the action maintainable.

If, then, (applying the law as I have stated it to the facts of the case) you think the letter sent to Sir *F. Freeling* by the defendant was a *bonâ fide* and fair communication, you will find your verdict for the defendant; otherwise for the plaintiff.

Verdict for the defendant.

Follett and *Butt* for the plaintiff.

Coleridge Serjt. and *Jeremy* for the defendant.

EXETER.

Coram PATTESON J.

COOK v. HEARN.

EXETER,
August 4.

Assumpsit by landlord against tenant for the non-repair of the premises rented.

It came out, on cross-examination of the plaintiff's witnesses, that the defendant held under a written agreement. It was objected that the agree-

with a view to give secondary evidence of the rule, no notice to produce or *subpœna duces tecum* having been served. It is too late at the trial to serve such notice.

The attorney for the opposite party cannot be asked whether he has with him a rule of Court relating to the cause,

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ment should be produced : in order to get over the objection, *Bompas* Serjt., for the plaintiff, attempted to show that the defendant had paid money into Court. For this purpose he called the defendant's attorney, and asked him if he had not in court the rule for payment of money into Court. This was objected to on the ground that no notice to produce had been given, or *subpœna duces tecum* served on the attorney.

PATTESON J. refused to allow the question.

Bompas Serjt. then offered to give notice to produce immediately.

PATTESON J. said that would make no difference. It is too late to give notice. You may take it that you have now given such notice for the sake of raising the point.

The plaintiff was allowed to take a verdict for 3*l.*, with liberty for the defendant to move to enter a nonsuit, because the agreement was not produced, and therefore secondary evidence was inadmissible.

In the following term the Court granted a rule *nisi* to enter a nonsuit accordingly ; and on the motion *Patteson* J. mentioned what he had done as to the notice to produce, and examining the defendant's attorney, and the other learned Judges, *Parke* and *Taunton*, assented.

Bompas Serjt. for the plaintiff.

Merewether Serjt. and *Moody* for the defendant.

See *Bevan v. Water*, M. & M. 235., where notice to produce a letter having been served, the attorney was asked as to having the letters in Court. It seems to have been doubted whether a party could call for a document in Court in the hands of the other party, without having given notice to produce. Phillipps on Evidence, 425.; Starkie, 362.; Roscoe, 4, 5. From the decision in the principal case, it would appear that in all cases notice to produce is essential.

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WELLS.
Coram PATTESON J.

BARDEN *v.* COX.

THIS was an action of trespass to recover the mesne profits of an estate and premises in *Keynsham*, which the plaintiff had recovered in ejectment against the defendant.

The cause was undefended, and the jury gave a verdict for 17*l.*, including the costs in the ejectment.

Moody, for the plaintiff, applied for immediate execution, under 1 *W. 4. c. 7. s. 2.*

PATTESON J. Yes. I think this a fit case for immediate execution. There has been some doubt amongst some of the Judges, whether the statute was not intended to be confined to cases of contract, but I think this case within the statute. You may have execution in a fortnight.

The stat.
1 *W. 4. c. 7.*
s. 2. is not
limited to
cases of con-
tract, but
applies to all
actions where
the Judge
thinks there
ought to be
early execu-
tion.

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WELLS.
August 20.

HARWOOD v. KEYS and Others.

The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney.

THIS was an issue directed by the Lord Chancellor to try whether a commission of bankruptcy, issued against *J. and W. Terry*, was concerted between the bankrupt, the petitioning creditor *Ellen*, and *Else* the attorney for the commission.

The plaintiff was the creditor petitioning for the supersedeas, and the order of the Lord Chancellor directed that the defendants, who were the assignees, should call the bankrupt, and the petitioning creditor, and the attorney *Else*, as their witnesses.

Wilde Serjt., for the plaintiff, offered in evidence the declarations of *Ellen*, who was since dead, made after the issuing of the commission, and contended that the petitioning creditor having given bond to the Lord Chancellor to establish the commission, was the party really concerned in interest; and the general rule is, that the declarations of the party really concerned in interest are admissible, *Dowden v. Fowle*, 4 Camp. 38., in which it was only suggested, and not proved, that the petitioning creditor had indemnified the sheriff, and *Young v. Smith*, 6 Esp. 121. The petitioning creditor was, at the time of the declarations made, the party nominally as well as really interested. The assignees come in to support the commission at a later period, and take up *his* cause; they must therefore take the case as they find it, and cannot object to any evidence, which would have been receivable against *him*, if he

had remained the nominal party, as the real interest remains.

It was also contended that the declarations having been made when against the interest of the party, and he being dead, his declarations were admissible, as the plaintiff could not call him.

On the other side it was contended, that the petitioning creditor was not the real party, and that it had been so decided by *Bosanquet J.* on a former trial of this cause, when the declarations were rejected, and by the Lord Chancellor on the hearing, when he directed a new trial. That *Dowden v. Fowle* was no authority to this point, because it was there taken on both sides, that the sheriff was indemnified by the party whose declarations were received.

PATTESON J. I think I cannot receive the evidence. The latter ground is clearly not sufficient : — and I cannot take the petitioning creditor to be the real party interested in the cause ; for, if so, the Lord Chancellor would, most probably, have ordered him to be made a nominal party on the record ; and the result of this trial, if the verdict be for the plaintiff, would not necessarily be the superseding the commission, this being merely a proceeding to satisfy the Chancellor's conscience. I cannot but think that in the case of *Young v. Smith*, which is loosely stated, the declarations must have been made before the commission ; and in the case of *Dowden v. Fowle*, the fact of the petitioning creditor's having indemnified the sheriff is mentioned by Mr. *Starkie* (a) as the principle of the decision ;

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HARWOOD

v.

KEYS and
OTHERS.

(a) See Starkie on Evid. part 4. p. 41.

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OTHERS.

and I think Mr. Justice *Dampier* must have determined the case on that ground.

Verdict for the defendants.

Wilde Serjt., *Rogers*, and *Erle* for the plaintiff.

Bompas Serjt., *Gunning*, and *Follett* for the defendant.

WELLS.
August 17.

PEARSON v. COLES.

In trespass, with plea of *liberum tenementum*, and no general issue, the defendant is entitled to begin.

THIS was an action of trespass. The first count charged the defendant with having broken and entered a certain close of the plaintiff called the *Lane*. The defendant pleaded, first, *liberum tenementum*, then several other pleas, in which the defendant claimed a right of way over the *locus in quo*. The pleas were severally traversed, and issues joined thereon. There was no general issue.

The Counsel for the defendant claimed the right to begin, on the ground that the trespasses being admitted, there was no affirmative issue on the plaintiff.

On the part of the plaintiff it was contended, that the plea of *liberum tenementum* was, in effect, a denial that the *locus in quo* was the close of the plaintiff. *Cocker v. Crompton*, 1 B. & C. 489., was relied on as showing that the defendant could not, under the plea of *liberum tenementum*, give evidence of having another close in the parish called

the *Lane*; and that, therefore, he must be confined to disproving the *locus in quo* being the property of the plaintiff.

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v.
COLES.

PARTESON J. said, that the effect of *Cocker v. Crompton* was, that the defendant must confine his proof to the particular close in the declaration; but that the language of the defendant's plea being in the affirmative, he might prove the close mentioned in the declaration to be his property, and was therefore entitled to begin.

Verdict for the defendant.

Follett, Bere, and Kinglake for the plaintiff.

Bompas Serjt., Rogers, and Erle for the defendant.

See Roscoe on Evidence, 386.

NORTHERN CIRCUIT.—LANCASTER.

Coram PARKE J.

WRIGHT *v.* WILSON.

LANCASTER.
August 20.

ASSUMPSIT to recover the amount of deposit agreed to be paid by the defendant as the purchaser of an estate sold by auction.

The defence was, a misdescription of the estate in the particulars of sale.

premises, or any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made," —the vendee is not released from his contract by reason of a misdescription in the particulars of sale, obvious on inspection of the premises, unless such misdescription was wilful and designed.

Where it is provided by the conditions of sale by auction, that "if any mistake be made in the description of the

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WRIGHT

v.

WILSON.

The particulars of sale referred to a map as containing the description of the estate, and in that map a turnpike road was set out immediately adjoining the premises; whereas it turned out that there was no turnpike road within a quarter of a mile, and that what on the face of the map appeared as a turnpike road was, in fact, a mere footpath.

There was no evidence on either side to show how the misdescription had originated.

F. Pollock, for the plaintiff, relied on one of the conditions of sale, by which it was provided, "that if any mistake be made in the description of the premises, or any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation, or equivalent, shall be given or taken as the case may require, such compensation, or equivalent, to be settled by two referees," &c.

Wightman, for the defendant, insisted that the misdescription was so gross as to release the defendant from his contract, and that the condition of sale, relied upon by the other side, had no application where the misdescription arose from actual fraud on the part of the vendors, or from negligence so gross as to amount to fraud in the eye of the law. It never could be intended that the condition was to bind a purchaser to his bargain, where the misdescription was so gross as utterly to alter the nature of the thing purchased; for example, supposing the premises had been described as land comprising a house and garden, and it turned out, on enquiry, to be merely a piece of mountain-land.

In like manner he offered to prove, that, in the present case, the absence of the turnpike road rendered the estate utterly valueless to the purchaser.

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WRIGHT
v.
WILSON.

PARKE J. (after referring to the case of the *Duke of Norfolk v. Worthy*)(a) said that he should direct the jury that, if the misdescription was a wilful and designed one, and had been inserted by any one employed to make the plan, or connected with the sale, that would be a fraud adopted by the vendors, and, consequently, would annul the bargain altogether, although the vendors themselves might not have been aware of the misdescription. But if the jury thought that the misdescription had originated in *error*, then, however gross the negligence of the vendors might be, he was of opinion that they were bound to find their verdict for the plaintiff. Supposing, even, that the mistake were so important as the defendant's counsel offered to prove it to be, still the defendant must abide the event of having bought an estate without looking at it, and subject to such a condition as that now in question. And he was further of opinion that the *onus* of proving the fraud lay on the defendant, the presumption of law being against fraud.

On this expression of the learned Judge's opinion, the defendant agreed to a reference.

F. Pollock and *Roscoe* for the plaintiff.

Wightman for the defendant.

(a) 1 Campb. 340.

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LANCASTER.
August 23.LEES, Assignee of BENNETT, a Bankrupt, &c.
v. MARTON, Esq., Sheriff, &c., and SEDG-
WICK.

The declar-
ations of a
trader made
shortly after
an absence,
are not ad-
missible to
prove such
absence an
act of bank-
ruptcy.

Semble.

That a breach
of an appoint-
ment by a
trader to call
at his credi-
tor's house to
pay a debt, is
not an act of
bankruptcy.

ACTION of trover to recover the value of goods of the bankrupt sold by the defendant *Marton*, as sheriff, under a *fi. fa.* at the suit of *Sedgwick*, issued against the bankrupt after an act of bankruptcy.

Notice had been given that the defendants disputed the act of bankruptcy. The plaintiff relied first upon an act of bankruptcy committed in *December* 1831.

The evidence was, that between seven and eight in the morning the witness (a creditor) called on the bankrupt to get payment of his account; he was informed by the servant that the bankrupt was up stairs; presently afterwards the bankrupt's wife came down and said the bankrupt was *out*; in the evening of the same day the creditor called again, and saw the bankrupt, and had some conversation with him about his absence in the morning; and upon that occasion the bankrupt made a statement respecting his absence, which the plaintiff now sought to give in evidence.

J. Williams, for the defendants, objected, that as the statement was not made at the time, it could not be received in evidence.

F. Pollock and *Alexander*, *contra*, insisted that the statement being made by the bankrupt so soon after his absenting himself, and immediately upon

his return home, was to be considered as part of the *res gesta*; and they cited *Bateman v. Baillie*, 1 T. R. 512., *Rawson v. Haigh*, 2 Bing. 99., and *Phillips on Evidence*, vol. ii. p. 339., 6th edit.

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v.
MARTON and
ANOTHER.

PARKE J. rejected the evidence, saying, that unless the statement could be proved to have been made by the bankrupt whilst he was absenting himself, or immediately upon his return, it could not be admitted as part of the *res gesta*. (a)

The plaintiff then gave evidence of an act of bankruptcy alleged to have been committed by *Bennett's absenting himself* from a creditor in January 1832; as to which the creditor being called as a witness by the plaintiff, swore, that on his applying to *Bennett* for payment of his debt, he, *Bennett*, several times promised to come over to the witness's residence to settle with him; but the witness said that *Bennett* had always failed to come over; in particular, the witness gave evi-

(a) See *Ridley and Others, Assignees of White, a Bankrupt, &c. v. Gyde*, 9 Bing. R. 349., decided in Michaelmas term 1832. The act of bankruptcy relied upon was a warrant of attorney and bill of sale given by the bankrupt to the defendant on the 25th of October 1830, and constituting (as it was alleged) a fraudulent preference made in contemplation of bankruptcy; and on the trial the plaintiffs were allowed to give evidence of a conversation which took place between the bankrupt and the witness on the 20th of November following, respecting this assignment to the defendant. On motion for a new trial, the Court of C. P. (*dissentiente Gaselee J.*) held that the evidence had been properly received, and the Lord Chief Justice said, 'The Court must in each case consider whether the declaration proposed to be received does or does not come within a reasonable time of the disputed act.'

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dence that *Bennett* had appointed to come over to the witness on a particular day in *January*, and had failed to keep that appointment. *Bennett* lived and carried on business at *Manchester*; the witness's residence was about three miles off. It did not appear that the bankrupt had ever fixed any particular *hour* for coming over to the witness's residence.

It was contended for the plaintiffs that by this conduct *Bennett* had *absented* himself from his creditors in such a way as amounted to an act of bankruptcy; and *Curteis v. Willes*, R. & M. 58., and *Parke v. Prosser*, 1 Carr. & P. 176., were cited.

J. Williams, contra, cited *Tucker v. Jones*, 2 Bing. p. 2.

PARKE J. If a debtor makes an appointment to meet his creditor at his, the debtor's, place of business, or at a place usually resorted to by him in the way of his business, or at any other specified place, not being the place of residence of the creditor, and then the debtor breaks the appointment, and absents himself with a view to delay his creditor, this is an act of bankruptcy. But no case has yet gone the length of deciding that where the appointment was to meet the creditor at his, *the creditor's*, residence, and the debtor breaks that appointment, — such conduct amounts to an act of bankruptcy. I will not now give any opinion whether it do, or do not, amount to an act of bankruptcy; for, in the present case, it does not appear to me that the question arises, inasmuch as I do not find that any thing amounting to an ap-

pointment to meet the creditor, even at the residence of the latter, has been proved: the bankrupt promised indeed to go over to the creditor's on the day in question; but this was in very vague terms, no particular hour being fixed, nor any arrangement made for the creditor's staying at home to receive him. The bankrupt, it is true, did not go over to the creditor's; but if his omission to do so were to be deemed an *absenting* himself within the meaning of the bankrupt law, it would be difficult for any man in considerable business to avoid committing an act of bankruptcy.

Verdict for the defendant.

F. Pollock and *Alexander* for the plaintiff.

J. Williams and *Brandt* for the defendant.

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v.
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ANOTHER.

(In the Court of Common Pleas at Lancaster.)

Coram PARKE J.

JENNER, Assignee of W. WHITEHOUSE, v.
CLEGG and Others.

LANCASTER.
August 23.

THIS was an action of replevin.

There were several avowries, justifying the distress for rent in arrear. The avowries which were ultimately relied upon stated that the said *W. Whitehouse*, and one *S. Whitehouse*, for a long time before and on the 1st of *April* 1832, and thence until and at the time when, &c. held the

A tenant holding over after notice to quit given by the landlord, is not liable to a distress, without some evidence of a renewal of the tenancy.

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premises in which, &c. as tenants to the defendants at and under the yearly rent of 370*l.*, payable half-yearly (each half year's rent to be paid in advance), to wit, on the 1st of *April* and 1st of *October* in every year; and because a large sum of money of the rent aforesaid, to wit, &c. for the space of half a year, commencing on the 1st of *April* 1832, on said 1st of *April* 1832, and thence until and at the time when, &c. was due, &c. from &c. to &c. they the said defendants well avow, &c.

To these avowries the plaintiffs pleaded in bar *non tenuerunt*, and riens in arrear.

The facts were, that in *March* 1830, an agreement in writing was entered into between the defendants and the *Whitehouses*, by which the former agreed to let, and the latter agreed to take the premises in question from the 1st of *April* then next for one year, and from and after the expiration of that term, as long as the parties might please, at the rent before-mentioned, payable half-yearly (the half year's rent to be payable in advance), on the days before mentioned; and for such rent in advance the landlord was to have a right to distrain.

On the 29th of *September* 1831, the defendants gave the *Whitehouses* notice to quit on the 1st of *April* then next.

The *Whitehouses* did *not* quit the premises on the 1st of *April*, but held over, and whilst they did so (viz. in *June* 1832), the defendants distrained for half a year's rent, due (as they contended) on the 1st of *April* 1832, in advance, in respect of the half year commencing on that day, and which would end 1st of *October* 1832. All the

rent for the two years, commencing 1st of *April* 1830, and ending 1st *April* 1832, had been paid.

Wightman and *R. C. Hildyard* for the defendants, contended that the landlord had a good right to distrain for the rent, which (by anticipation) became due, according to the agreement, on the 1st of *April* 1832. It was true the landlords had given notice to quit, but that notice they had waived by making the distress. And as to the tenants, *they* also had waived it, by remaining in possession after the expiration of the notice.

F. Pollock contra. If the argument on the other side be good, it would shew that if the tenants remained in possession any part of a single day after the notice to quit had expired, the landlord might at once distrain for the whole half year's rent; to warrant the distress, it must be shewn that there was a holding on at a specified and agreed rent. *Hegan v. Johnson.* (a)

PARKE J. I am clearly of opinion that the defendants had no right to distrain. The tenants have not waived the notice to quit by holding over. The landlords may recover the double value during the period of the holding over, or they may bring an action for use and occupation, and recover such sum as a jury think proper to award; but they cannot distrain, unless they can shew an agreement between the parties to hold on at the old rent. The point has, in effect, been decided in a case tried before Mr. J. *Bayley*, where he

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(a) 2 Taunt. 148.

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ruled, that a tenant holding over after his notice to quit was liable in an action for use and occupation only for the period of time during which he continued in possession, and not for the whole half year.

Verdict for the plaintiffs.

F. Pollock and for plaintiffs.
Wightman and *R. C. Hildyard* for defendants.

Wightman next morning (*coram Bolland B.*), moved for, and obtained a rule to shew cause why the verdict should not be set aside, on the ground of a misdirection in point of law on the part of the learned Judge, before whom the trial had taken place.

In the course of *Hilary* term 1833 *F. Pollock* shewed cause against the rule, before *Parke J.* and *Bolland B.*, and contended, that the mere holding over by the tenant for two months after the expiration of the notice to quit given by the landlord, was not evidence of a new tenancy at the old rent, and that being so, the defendants could not legally distrain. The tenant by holding over was a wrongdoer, and might have been treated as such.

R. C. Hildyard and *Butt* contra. It makes no difference in this case, that the rent was payable in advance, *Backley v. Taylor (a)*, *Harrison v. Barry (b)*; forehand rent may be distrained for, in the same way as where it is due by effluxion of time. The tenants in the present instance cannot

(a) 2 T. R. 600.

(b) 7 Price, 690.

contend that their tenancy was determined by the notice. It is settled that a landlord may waive his notice, by accepting rent due after the expiration of the notice, by recovering such rent in an action of use and occupation, or by giving a second notice to quit at a time subsequent to that mentioned in the previous notice. In those cases, the parties stand as if no notice to quit had been given. Then, in like manner, the tenant may do acts which will prevent his saying that the tenancy was determined; and what act can be stronger than his holding the demised premises after the expiration of the notice? There is no case in which it has been decided, that, under circumstances like the present, the landlord is not entitled to treat the tenancy as continuing, and to distrain; and a decision against the defendants in this case would go to this, that where a landlord gives a notice to quit, and the tenant does not quit in pursuance of it, the latter shall be entitled to say that he is not a tenant, but a trespasser. This would be giving the election to the wrong-doer, whereas the well settled rule of law is the other way. Here the landlord was entitled to waive the tort, and treat the plaintiffs as tenants. See *Rede v. Farr* (a), *Doe dem. Bryan v. Bankes* (b), *Mayor of Newport v. Saunders* (c), *Harding v. Crethorn* (d), *Bishop v. Howard*. (e)

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 OTHERS.

PARKE J. I am of opinion that the landlord in this case was not entitled to distrain. The question

(a) 6 M. & S. 121.

(b) 4 B. & Ald. 401.

(c) 3 B. & Ad. 411.

(d) 1 Esp. N. P. C. 57.

(e) 2 B. & C. 100.

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is, whether a new tenancy can be implied? I do not think it can. The landlord had his remedy by action for double value, for use and occupation, or by ejectment; but the mere holding over did not make the party a tenant upon the old terms, so as to confer the right of distress.

BOLLAND B. concurring, the rule for a new trial was

Discharged.

YORK.

Coram PARKE J.

YORK.

August 28.

THORNTON and Another v. PLACE.

When a tradesman finishes work differing from the specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price, minus such a sum as it would take to complete the work according to the specification.

ASSUMPSIT to recover 18*l.*, being the balance of an account for work and labour and materials.

Plea, general issue.

The defendants had paid 14*l.* into court.

The plaintiffs were slaters, and their present demand was for slating some buildings of the defendants.

By the agreement between the parties, the work was to have been executed according to a specification furnished by the plaintiffs, and at prices therein mentioned. Supposing the work to have been duly performed by the plaintiffs according to the terms of the specification, it was admitted that they would be entitled to the full sum now claimed (18*l.*) The defendants, however, proved that the work had not been performed according to the

terms of the specification, that it was consequently less weather-proof, and that it would cost between 10*l.* and 11*l.* to alter the work so as to make it correspond with the specification. The plaintiffs, on the other hand, produced evidence to shew that the sum they sought to recover (when added to that already paid on account) would only amount to a fair price for the work as they had actually done it.

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 v.
 PLACE.

PARKE J., in charging the jury, told them, — when a party engages to do certain work on certain specified terms, and in a certain specified manner — but, in fact, does not perform the work so as to correspond with the specification, — he is not, of course, entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification.

Verdict for the defendant.

Cresswell and *Blanshard* for the plaintiffs.

F. Pollock and *Wightman* for the defendant.

1832.

YORK.
August 31.

YOUNGE v. CROOKS.

The plaintiff is entitled to early execution under 1 W. 4. c. 7. s. 2. in actions of debt, as well as in other forms of action.

DEBT for goods sold and delivered.

The action was undefended.

Verdict for plaintiff.

Hoggins, for the plaintiff, applied for leave to take out immediate execution.

PARKE J. Lord *Tenterden* has (*a*) refused to grant a certificate for immediate execution, in actions of debt on simple contract. In consequence of Lord *Tenterden*'s having acted on that rule, I thought it right, when a case of this sort occurred at the late assizes at *Carlisle*, to hold a conference on the subject with my Brother *Bolland*, and on consideration it appeared to us that the same principle ought to prevail in this form of action as in others.

Certificate granted.

(*a*) See *Fisher v. Davies*, *suprà*, p. 93.; *Percival v. Alcock*, 167.

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GOODWIN v. COATES.

YORK.
Sept. 1.

INDEBITATUS ASSUMPSIT for goods sold and delivered.

The goods having been bought by the defendant of the plaintiff, had been subsequently resold by the defendant to one *Pollard*, and delivered by the plaintiff to *Pollard*. *Pollard*, in payment for the goods, gave the defendant the following promissory note: —

“ *Doncaster, 27th December 1831.*

“ Two months after date I promise to pay Mr. *George Goodwin*, or order, the sum of 211*l.* 5*s.*
Value received.

“ At Messrs. *Coutts* and Co., “ *John Pollard*.
“ Bankers, *London*.”

The defendant handed over the note to the plaintiff; the plaintiff wished him to indorse it, but the defendant refused to do so. The note fell due before the commencement of the action, and it was produced on the trial by the plaintiff.

F. Pollock, for the defendant, insisted that the plaintiff was bound to produce proof of the note having been presented to the maker for payment, or at least of some demand having been made upon that person; but

PARKE J. said that no demand was required as against the maker of the note, and, therefore, he

Where the buyer of goods hands over to the seller the promissory note of a third party, without indorsing it: Held, that in an action for the price of the goods the plaintiff need not prove presentment of the promissory note to the maker.

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thought that no demand was necessary as against the present defendant. It was clear that the note was not paid: it was still in the payee's possession; and as it was the duty of the maker to pay the note without demand, he was of opinion that it was the duty of the defendant to see that it was paid. (a)

Verdict for the plaintiff. Damages, 210*l*.

(a) Where a debtor hands over a bill or promissory note to his creditor, having first indorsed it, the creditor cannot sue him for the original debt without proving, first, that the bill or note was duly presented for payment and dishonoured; and, secondly, that due notice of the dishonour was given to the Defendant, and also to the other parties entitled to have such notice by the custom of merchants. *Bridges v. Berry*, 3 Taunt. 130.; *Kearslake v. Morgan*, 5 Term Rep. 513. But where (as in the principal case) the debtor hands over to his creditor, without indorsement, a bill of exchange or promissory note to which he, the debtor, is *not* a party, it has long been settled that the creditor (suing on his original cause of action) is not bound to prove that he gave *notice* of the dishonour of the bill either to the drawer or to the debtor who so handed it over to him, *Bishop v. Rowe*, 3 M. & S. 362.; but it would seem that the Court of King's Bench in the case referred to was of opinion that the creditor was bound to present such a bill to the acceptor for payment, 3 M. & S. 365., although not bound to give notice of the dishonour. It is, however, difficult to say on what principle this distinction can rest; for if it be necessary for the holder to shew due diligence on his part, his proving presentment alone, without notice, would not suffice; and if the onus of shewing due diligence do not lie upon him, it is not easy to say why he should be required to prove even the presentment.

The rule to be deduced from the principal case seems, that where the bill or note has been handed over to the creditor by his debtor without indorsement, the creditor should only be required to give such general evidence as will, in the language of *Le Blanc J.*, *Bishop v. Rowe*, 3 M. & S. 367., "negative the presumption of payment arising from the delivery of the bill."

J. Williams and Wightman for the plaintiff.

F. Pollock and Alexander for the defendant.

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Where the creditor has agreed to take the bill or note, "*for and in satisfaction of his debt*," the words of the stat. 3 & 4 Anne, c. 9. s. 7. probably may render it obligatory upon him to shew that he has "taken his due course to obtain payment."

SWAIN v. SHEPHERD.

YORK.
Sept. 4.

CASE against carriers for loss of goods.

The plaintiffs were manufacturers at *Huddersfield*.

The defendant was a carrier from *Huddersfield* to *Settle*.

One *Metcalf*, a tradesman at *Settle*, had sent to the plaintiff a written order, desiring him to send him a certain quantity of kersey at a specified price, and to forward it by the defendant's waggon.

The plaintiff accordingly delivered the goods at the defendant's office at *Huddersfield*, and they were lost in the course of the journey.

The plaintiff's clerk gave evidence, that, according to the custom of the plaintiff's business, if goods were ordered by a customer living at a distance from *Huddersfield*, the plaintiffs forwarded the same; but if the customer, on their arrival, disapproved of the goods, he was at liberty to send them back, and that in such cases the plaintiff paid

When goods are forwarded for sale on approval, the consignor is the party to sue the carriers for the loss of the goods.

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SHEPHERD.

the carriage both ways; no express agreement had been made with *Metcalf* on the subject. The plaintiff, at different times, had supplied *Metcalf* with about twenty-seven parcels of goods; and, on five of those occasions, *Metcalf* had returned part of the goods; but no instance was given of any one entire parcel of goods being returned.

J. Williams, for the defendant, contended that the action should have been brought by the consignee, *Dawes v. Peck*, 8 T. R. 330.

PARKE J. Generally speaking, where goods of a fair merchantable quality are forwarded in pursuance of a written order, which binds the person giving the order to receive the goods, the property passes to that person by the delivery to the carrier, and *he* is the proper person to sue the carrier if the goods are lost; but if the jury believe the evidence of the plaintiff's clerk, the goods were sent merely for approval, and no property would pass to *Metcalf* until he received and adopted the goods. The jury are to judge how far the account given by the witness is to be relied upon.

Verdict for the plaintiff—

F. Pollock and *Wightman* for the plaintiff.

J. Williams and *Milner* for the defendant.

MEMORANDA.

THE Right Honourable *Charles* Lord *Tenterden*, Lord Chief Justice of the Court of King's Bench, died the early part of this term; and was succeeded by Sir *Thomas Denman*, Knight, His Majesty's Attorney-General, who was called to the degree of the coif, and gave rings with the motto, '*Lex omnibus una.*' On the 8th of November Sir *Thomas* was sworn into office, and took his seat on the Bench on the following day.

Sir *William Horne*, Solicitor-General to His Majesty, succeeded to the office of Attorney-General; and *John Campbell*, of *Lincoln's Inn*, Esquire, one of His Majesty's Counsel, was appointed Solicitor-General to His Majesty, and afterwards received the honour of knighthood.

On the first day of this term, *John Beames*, *Robert Mounsey Rolfe*, and *Clement Tudway Swanston*, of *Lincoln's Inn*, Esquires, and *Henry Hall Joy*, of the *Inner Temple*, Esquire, having been, during the preceding vacation, appointed His Majesty's Counsel, were called within the bar, and took their seats accordingly: and

Mr. Serjt. *Spankie* was appointed one of His Majesty's Serjeants, and took his seat within the bar accordingly.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN K. B.

AT THE SITTINGS IN AND AFTER
MICHAELMAS TERM,
3 W. IV. 1832.

1832.

Nov. 5.

FIRST SITTINGS IN TERM AT WESTMINSTER.

THIS was the day appointed by Lord *Tenterden* for the sitting at *Nisi Prius* in term. Mr. Justice *Littledale*, whose turn it was to preside at *Nisi Prius*, having suggested a doubt, whether, upon the death of the Lord Chief Justice, which took place on *Sunday* the 4th, there were any power under the statute to sit at *Nisi Prius* during a vacancy, — consulted the other Judges of this Court, and returned into Court and stated, that as there were great difficulties and doubts on the jurisdiction of the Court to sit during a vacancy, inasmuch as there was no associate, and a failure of other formalities under the statute, the Court had determined not to try any causes, unless the parties agreed to try. No parties consenting, his Lordship said, that even if parties would consent, it would be difficult to proceed, as no witness could be indicted for perjury unless the Court had jurisdiction; and, therefore, he discharged the jury from further attendance until again summoned.

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SCOTT v. HENLEY.

WESTMINSTER,
Nov. 9.

ACTION against the sheriff of *Chester* for a false return of *non est inventus*, to a *latitat* against one *Newnham*, and for an escape.

The sheriff is not liable for an escape on *mesne process* for the whole debt, if the plaintiff's remedy remains against a solvent party, but only for so much as his remedy is affected by the delay and escape, and his costs.

The officers had taken *Newnham* under the writ, and had discharged him on the undertaking of two friends. On the return to the writ, of *non est inventus*, the plaintiff commenced this action, but the officers put in bail for *Newnham*, and took him into custody, where he remained during the term ; but the Court discharged the bail, and the plaintiff went on with this action. The debt was a bill for 2000*l.*, accepted by *Newnham*, drawn by *Carter*, and indorsed by *Bebb* the payee. 1000*l.* had been paid. *Carter* was insolvent, *Bebb* the payee a practising attorney in *London* ; and it was contended that he was still liable on the bill, and competent to pay it.

LITLEDALE J. The liability of the officers for the execution of writs of *mesne process* is different from the case of writs of execution. There the party has a claim for the whole debt. In *mesne process* it is uncertain whether the party will recover at all, and he can only recover against the sheriff such damages as he can shew he has sustained. If he has lost the whole debt you must give him damages to that extent, and so much as he has lost in costs. If he can recover his debt

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against *Bebb* or *Carter*, or any part of it, you must diminish the damages accordingly.

Verdict for 250*l*.

Platt and *Hall* for the plaintiff.

Sir *J. Scarlett* and *Holt* for the defendant.

See also *Plunck v. Anderson*, 5 T. R. 40., and particularly the judgment of *Buller J.* In *Tempest v. Linley*, Clay. 34., which was an action on the case against the sheriff for an escape after an arrest on *mesne process*, it is said "the plaintiff proved the debt and the escape, and that the party arrested was become insolvent, otherwise he should not have recovered damages to the value of his debt, as here he did." In an action of debt for an escape after an arrest on final process, the jury must give the entire demand which would have been recoverable from the original defendant, *Bonafous v. Walker*, 2 T. R. 126. But even in the case of an escape after arrest on final process, if the plaintiff sue in case, instead of debt, the jury are at liberty to give less damages than the sum due from the original defendant, 1 Saund. 38. n. 2.

WESTMINSTER,
Nov. 29

CLEVE v. POWEL.

Communications made to an attorney, acting as such between two parties, are not privileged from disclosure against either party.

DEBT on bond for 200*l*. Pleas, *non est factum*, and usury.

The plaintiff called the subscribing witness of the bond, the clerk of *Besent*, who acted as at-

On a plea of usury to an action on a bond a verdict of acquittal in an action for the usury penalties on the same bond, between the same parties, is admissible for the plaintiff.

torney for both parties in the transaction of the loan.

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POWEL.

Law, in cross-examination, asked the witness as to what the plaintiff said at the time to him.

Campbell objected, that *Besent* being the attorney of the plaintiff, the communication was privileged.

Law contrà. Here is an attorney for both parties in an illegal transaction. (a)

DENMAN C. J. Yes; I must receive the evidence. Either party has a right to the disclosure.

The defendant had brought an action against the plaintiff for the penalties under the stat. of *Anne* for usury, and the jury in that action found a verdict for the defendant. The record in that action was offered by the plaintiff in this.

On objection by the defendant's counsel that this was inadmissible,

DENMAN C. J. ruled that the evidence was admissible, and received it.

The record was admitted.

The subscribing witness to the bond, on cross-examination, proved the usurious contract; and

(a) *Baugh v. Cradocke*, *suprà*, 182.

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Law submitted that the plaintiff ought to be nonsuited, inasmuch as the witness for the plaintiff must be taken to be true or false. If true, he had proved the usury; if false, he had not proved the plaintiff's case of the bond.

DENMAN C. J. It has never been held that a jury are bound to believe or disbelieve the whole of a witness's testimony. They may believe one part, and disbelieve the other.

The defendant called witnesses, and there was a
Verdict for plaintiff.

Campbell S. G. and *Talfourd* for the plaintiff.

Law and *Comyn* for the defendant.

WESTMINSTER,
Dec. 3.

ROBERTS v. MACORD.

The use of an open space of ground in a particular way requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air.

TRESPASS for breaking down a wall.

There were two special pleas, justifying the trespasses, on the ground that the wall obstructed ancient lights of the defendant.

The third special plea alleged, that long before and at the time when, &c. the defendant was lawfully possessed of a timber-yard and saw-pit, used for the purpose of keeping, drying, and sawing timber therein; and that there long had been, and the defendant was still lawfully entitled to have

the benefit of, a certain open space, at the side of the said timber-yard and next adjoining thereto, for the admission of light and air into the said timber-yard and saw-pit, for the drying of the timber, and for the more convenient use and occupation of his timber-yard and saw-pit. That the plaintiff wrongfully erected the wall on the said open space, and thereby prevented the light and air, &c. &c. Whereupon defendant, &c.

Replication, *de injuriâ*, &c.

The two first special pleas failed, the evidence shewing that the lights obstructed had not been enjoyed twenty years.

As to the third special plea, the facts were shortly these :— The defendant had long been possessed of two messuages, and of an open piece of ground lying between them ; in that open space the defendant had for a considerable period of time, and for upwards of twenty years, had a saw-pit and timber-yard, and been in the habit of laying wood upon the ground, for the purpose of drying, &c. About fifteen years ago the defendant erected a building used as a dwelling-house, over the open piece of ground, and connecting together the two messuages before mentioned. The building so erected by the defendant (though built *over* the piece of ground) was not carried up all the way from the surface of the ground, but was commenced at about sixteen or seventeen feet from the surface, and so carried up, leaving the whole surface of the piece of ground open as before. And since the erection the defendant had still used his saw-pit and timber-yard.

The wall in question was recently erected by

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the plaintiff on land situate at the end of the defendant's open piece of ground, and immediately opposite the building erected by the defendant fifteen years ago. The wall obstructed the admission of light into that building, and also (as the defendant's witnesses swore) prevented the free circulation of the air along the timber-yard, which was said to be desirable for the purpose of drying and keeping the timber.

For the plaintiff, it was contended, that this was a novel expedient, by which, under pretence of the timber-yard and saw-pit, the defendant was in reality seeking to prevent his *modern* lights from being obstructed; and it was contended that there was no precedent for claiming a right to the unobstructed enjoyment of light and air under circumstances like these; and further, that the defendant had himself done the principal act towards keeping out the light and air, by building *over* the ground.

PATTESON J. said the plea was a very novel one, and one which in his opinion could not be supported in point of law. If such a plea could be sustained, it would follow that a man might acquire an exclusive right to the light and air, not only (as heretofore) by having been suffered to build on the edge of his property, and suffered for a certain space of time to enjoy that building without interruption, but merely by reason of having been in the habit of laying a few boards on his ground to dry. Such a rule would be very inconvenient and very unjust. Still, the question in

the present stage of the proceedings was, whether the plea was proved in point of *fact*?

Upon that point he did not think that the mere circumstance of the defendant's having had a saw-pit upon the premises, and laid his timber there, during twenty years, would, in a case like this, be sufficient to raise the presumption of a grant. The jury must look to all the circumstances of the case, not forgetting the manner in which the defendant himself had occupied the premises. The questions for the jury were, whether the defendant had in fact used the saw-pit and timber-yard for twenty years; and whether, during that time, the light and air had been *really necessary* for the purpose stated in the defendant's plea. If both these facts were made out to the satisfaction of the jury, they would find their verdict for the defendant, otherwise for the plaintiff.

Verdict for plaintiff, damages 1s.

Sir *J. Scarlett* and *F. Kelly* for the plaintiff.

F. Pollock and *Butt* for the defendant.

MORRIS v. LOTAN.

WESTMINSTER,
Dec. 11.

ASSUMPSIT for goods sold and delivered.

Plea in abatement; the non-joinder of several other joint contractors, and issue thereon.

Thesiger, for the defendant, claimed the right to begin. He cited *Cotton v. James*, M. & M. 273.

Upon a plea in abatement of the non-joinder of other parties, the plaintiff is entitled to begin unless the damages are admitted.

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DENMAN C. J. I recollect being in a case subsequent to that before Lord *Tenterden*, in which it was decided the plaintiff should begin unless the damages are admitted. I am aware of the difference in the decisions; but my opinion is, that the plaintiff should begin.

Thesiger then admitted the damages, and began for the defendant.

Verdict for the plaintiff

See also *Fowler v. Coster*, M. & M. 241.

GUILDHALL,
Dec. 18.

READING v. MENHAM.

The hirer of a carriage by the year under a written agreement, binding the carriage maker "to keep the same in perfect repair without any further charges whatever," is not liable for repairs made necessary by accident, and not by the wilful default of the hirer.

ASSUMPSIT for the hire of a gig, and for work and labour and materials.

The action was brought to recover a balance of about 35*l.*, alleged to be due from the defendant to the plaintiff for the hire of a gig, and for repairs done to a gig.

The plaintiff was a carriage-builder in *London*, and it was proved by his witnesses that he let a gig to the defendant on hire, at the rate of eighteen guineas a year; that the gig, whilst it remained in the defendant's possession, was much injured, one shaft being broken, the other damaged: it was thereupon sent to the plaintiff's manufactory to be repaired, and the action was brought for the cost of these repairs, and the loan of another gig whilst

the damaged one was under repair. It was proved that the repairs, in the present instance, were not rendered necessary by fair wear and tear. And the usage in the trade was proved to be, that when a carriage is let out on hire for a year, &c. the lender of the carriage is only to keep it in repair, so far as reparations become necessary by fair wear and tear; but if they become necessary by reason of the carriage sustaining any unusual injury (as in this case), he charges for the repair, and he also charges for the hire of another carriage (whilst he is repairing the injured one), at an advanced rate; that is, the charge is made, in such cases, at the rate of a weekly hiring instead of a yearly hiring. The plaintiff's demand was for the cost of the repairs, and for the hire of the second gig (supplied whilst the first was under repair), at the rate of 17s. or 18s. a week. The defendant had paid into Court what would be due for one gig at the rate of eighteen guineas a year.

For the defendant a written agreement was put in, which had been entered into between him and the plaintiff, by which agreement the plaintiff agreed to let a gig to the defendant, and "*to keep the same in perfect repair, and to put new linings and new wheels once every twelve months, so long as the defendant should choose to keep it, at the rate of eighteen guineas a year, without any further charges whatever.*" And it was then proved by the defendant's groom, that the accident, which happened to the gig, did not arise from any negligence or improper driving of the defendant, but entirely from the furious driving of a third person,

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who was driving another carriage along the road, and improperly struck against the defendant's gig.

Sir *James Scarlett*, thereupon, submitted that the plaintiff could not recover; for that, under the terms of the agreement, the coach-builder had taken the expense of repairs entirely on himself, in consideration of the yearly payment of eighteen guineas. If it had been meant to hold the defendant liable to the expense of repairs in case of accidents happening, the agreement should have been so worded; whereas the terms used by the parties excluded the plaintiff from making "*any further charge whatever.*" At all events, if any exception could be implied, it could only be in the case of injury happening to the gig from the hirer's own negligence, or improper conduct.

Platt, contra, relied on the usage proved, as explanatory of the terms used by the parties.

DENMAN C. J. said, he was clearly of opinion that the terms of the agreement subjected the plaintiff to the expense of repairs, although these repairs might have become necessary in consequence of an accident happening to the gig. Even if it had been shewn that the accident was attributable to the defendant himself, he was not prepared to say that the plaintiff could recover; for, looking to the terms of the agreement, it seemed to him that the only case in which the defendant could be subjected to the expense of the repairs was the case of damage happening to the

gig through the *wilful default of the defendant*. With regard to the evidence of the usage of the trade, the language of the agreement between the parties being clear and unequivocal, evidence as to the general usage of the trade could not be of any avail.

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 v.
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Nonsuit (with leave to move).

Platt and *Butt* for the plaintiff.

Sir *James Scarlett* and *Cowling* for the defendant.

No motion was made to set aside the nonsuit.

COOK v. STOKES and Wife.

GUILDHALL,
 Dec. 18.

ACTION for defamation by the female defendant, *per quod* the plaintiff, who had lived with the defendants as cook, was prevented from procuring another place in that capacity.

The count upon which the plaintiff was compelled to rely, alleged that the words were, "I cannot answer for the cleanliness of her (the plaintiff's) person, because she takes snuff;" according to one witness, the proof was, that the defendant said, "I cannot answer for the cleanliness of her person, because *I understand* she takes snuff;" according to another witness she said, "I cannot answer for the cleanliness of her person, because I *believe* she takes snuff."

An allegation of slanderous words, accompanied with an assertion of a fact as the foundation of the words, is not supported by evidence of the words, accompanied with an assertion of the speaker's belief only of the fact.

Objection, that there was a fatal variance.

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Sir *James Scarlett*, for the plaintiff, contended, that the former part of the words was sufficiently proved, there being evidence of a distinct allegation by the defendant, that she could not answer for the “cleanliness of the plaintiff’s person ;” and it had been proved by a witness, that the supposed want of cleanliness was the reason why that witness had declined engaging the plaintiff.

DENMAN C. J. The allegation of want of cleanliness was qualified by the reason which the defendant gave for making that allegation ; viz. that she understood the plaintiff took snuff. That part of the words has not been proved as laid ; for, according to the charge in the declaration, the defendant stated, as of her own knowledge, that the plaintiff took snuff ; whereas, according to the evidence, she only said she believed, or understood it : it appears to me, therefore, that the variance is fatal.

Nonsuit.

Sir *James Scarlett* and *Butt* for the plaintiff.

F. Kelly and *R. Gurney* for the defendants.

CASES

ARGUED AND DETERMINED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

MICHAELMAS TERM,

3 W. IV. 1832.

ADJOURNED SITTINGS AT WESTMINSTER.

ROBSON and Another, Assignees of GEORGE,
a Bankrupt, &c. v. ROLLS.

1832.
WESTMINSTER,
Dec. 5.

TROVER to recover the value of two bills of exchange, respectively drawn by *George*, upon and accepted by one *Davy*; one bill being for 200*l.*, the other for 100*l.*

The facts were, that *George*, shortly before he became a bankrupt, delivered to the defendant (who was a creditor) the two bills of exchange now in question; the defendant was to apply 80*l.* (part of the proceeds) in taking up an acceptance of *George* for a like sum, which the defendant had indorsed and got discounted for *George*, and which was then outstanding; the residue of the proceeds of the bills was to be applied in payment of the debt due from *George* to the defendant. At the time when the bills were so delivered to the de-

Where the drawer of a bill of exchange deposits it with a creditor, giving him authority to receive the proceeds, and apply them in a specified way — if the creditor, after an act of bankruptcy by such drawer, gives up the original bill to the acceptor, (taking another bill in lieu of it) this is a conversion by the cre-

ditor, and the assignees of the drawer may support trover.

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fendant, *George* was in embarrassed circumstances ; and it was contended that the act was done in contemplation of bankruptcy, and with the intention of giving the defendant a fraudulent preference over the other creditors.

The bills were not paid by *Davy* when due ; but the defendant, at the instance of *Davy*, gave them up to him, he delivering to the defendant in lieu of them an acceptance of one *Dalmaine* for 100%, together with two other bills.

This substitution of the bills took place without any communication with *George*, and at a period subsequent to the act of bankruptcy.

The original bills mentioned in the declaration had since been obtained by the plaintiffs from *Davy* ; none of the bills had been paid.

On these facts appearing, it was contended for the defendant, that there was no evidence of any conversion ; that the bills had been delivered by *George* to the defendant before the former became a bankrupt ; and the defendant was justified in taking the course he did, with a view to make the bills available towards paying the debt due to him, the assignees having done nothing in the interim to disaffirm the act of *George* ; and *Jones and Others, Assignees of Sykes v. Port*, 9 B. & Cress. 764., was relied upon as in point ; where it was held that a creditor, to whom a bill had been delivered under circumstances similar to those in the present case, was not guilty of a conversion, by merely getting it paid, and handing it over to the acceptor, there having been no demand and refusal of the bill.

TINDAL C. J. said the present case was distinguishable from the one cited by the defendant. There the party in whose hands the bill was placed did only that which, according to the terms of the deposit, he was authorized to do, and which it was necessary to do, in order to get the bill paid in due course; but here the defendant had no authority to renew or change the acceptances; and his delivering up the original acceptances under such circumstances, was a tortious act, for which he was liable in this form of action.

1832.
 Robson
 v.
 Rolls.

The defendant then contended, that the original delivery of the bills by the bankrupt took place under such circumstances as did not amount to a fraudulent preference; and, upon that point, the jury found a

Verdict for the defendant.

Hutchinson and Wightman for the plaintiffs.

Jones Serjt. and Miller for the defendant.

Another question arose and was debated at the trial; viz. as to the sufficiency of the act of bankruptcy relied upon; but the ruling of the Lord Chief Justice upon that point was afterwards brought under the consideration of the Court of Common Pleas. See the case reported in 9 *Bing.* 648.

1832.

 ADJOURNED SITTINGS IN LONDON.

 GUILDHALL,
 Dec. 20.
DOE dem. MARTIN *v.* MARTIN.

Where the attorney in a cause has been changed, a notice to produce, served (before the change) on the first attorney, is sufficient to call for production of the paper on the trial, without fresh service on the second attorney.

ON the 10th of *July* the lessor of the plaintiff served Mr. *Pinnero*, the defendant's then attorney, with a notice to produce a letter therein described, and therein stated to have been handed over to him, by Mr. *Ford*, the defendant's former attorney.

The defendant now appeared by a *third* attorney (having again changed his attorney in the regular way), and it was contended, that, under such circumstances, the service of the notice on a party, no longer attorney, was not sufficient to let in secondary evidence.

TINDAL C. J. I think the defendant is bound to produce the letter, or else the plaintiff may give secondary evidence of its contents. It would otherwise be a very easy thing to evade the effect of a notice to produce, by merely getting the attorney changed on the eve of a trial.

Verdict for the plaintiff.

Wilde Serjt. and *Ball* for the plaintiff.

Adams Serjt. for the defendant.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN K. B.

AT THE SITTINGS IN AND AFTER

HILARY TERM,

3 W. IV. 1833.

FIRST SITTINGS IN TERM.

DOE dem. MANNING v. HAY.

1833.
WESTMINSTER,
Jan. 19.

THIS was an ejectment commenced in 1825, stating a demise for seven years, which term had expired at the time the cause was called on.

It is too late to amend the record by increasing the term in ejectment after the cause has been called on.

Curwood, on the cause being called on, applied for leave to amend, by increasing the term to fourteen years.

PARKE J. refused to allow it: he said it was too late at the trial, — the plaintiff must withdraw the record.

Record withdrawn.

1833.

DOE dem.
MANNING

v.
HAY.

Curwood for the plaintiff.

Erle for the defendant.

See *Doe dem. Lewis v. Coles*, R. & M. N.P.C. 380., where *Best* C. J. allowed an amendment in the local description of the premises, on the cause being called on. See *Adams on Ejectment*, pp. 226, 227. 3d edit. *Paine v. Bustin*, 1 Star. 74.

ADJOURNED SITTINGS AT WESTMINSTER.

WESTMINSTER,
Feb. 6.

SCOTTS v. SEAGER.

Persons seeking their livelihood in Westminster are not privileged under the 23 G. 2. c. 27. from being sued elsewhere than in the Westminster court of requests for a debt under 40s. Such privilege is only given to inhabitants and residents.

ASSUMPSIT for goods sold and delivered.

Pleas. *Non assumpsit*. 2d. Statute of limitations. 3d. That the defendant, at the time of commencing the action, was seeking his livelihood within the city and liberty of *Westminster*, and that he was not indebted to the plaintiff at the said time in any sum or sums of money amounting to the sum of 40s., and was liable to be warned before the court of requests in *Westminster* for the said debt.

Replication, that the defendant was indebted in a sum amounting to 40s. and issue thereon.

It was clear that the defendant was indebted to the plaintiff in some sum clear of the statute of limitations, but the struggle in the cause was, whether that sum amounted to 40s., and it was contended, and stated to the jury by the counsel for the defendant, that the defendant would be entitled to a verdict under the statute 23 G. 2. c. 27., if the debt was under 40s., inasmuch as the replication

admitted that the defendant was a person locally within the jurisdiction, and only tendered an issue on the amount of the debt.

1833.

SCOTTS

v.

SEAGER.

PATTESON J. That is certainly the issue on the record, and must be left to the jury; but in my opinion the plea is a bad one. The eighth section of the act gives the plea, that the defendant was inhabitant and resiant within the city of *Westminster*, where the sum sued for appears on the declaration to be under 40s., and in cases where more than 40s. is claimed, it gives the plea that the debt was under 40s. over and above such matters as aforesaid, that is, over and above that he was an inhabitant and resiant. I think that the plea is only given to inhabitants and resiants. The mistake arises from looking at the sixth section, which points out the persons who are entitled to avail themselves of the jurisdiction as *plaintiffs*, and gives that privilege to persons seeking their livelihood within the city, as well as to inhabitants and resiants, — but the plea is only given to the latter.

The case went to the jury, who found a verdict for the plaintiff, damages 5*l*.

Kelly for the plaintiff.

Erle for the defendant.

Sect. 6. of the statute enacts, that from and after the 1st day of *May* 1750, it shall and may be lawful to and for every resiant and inhabitant within the city and liberty of *Westminster*, or the said part of the said dutchy, and to and for all and every person and persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood within the said city and liberty of *Westminster*, or in the said part of the said dutchy aforesaid, who

1833.

SCOTTS
v.
SEAGER.

now have, or hereafter shall have, any debt or debts due or owing to him, her, or them, not amounting to the sum of 40s. by any person or persons whatsoever, inhabiting or seeking a livelihood within the said city and liberty of *Westminster*, or in that part of the dutchy aforesaid, to apply to the said clerks of the said Court, &c.

Sect. 8. That if any action of debt, or action on the ~~case~~ upon an *assumpsit* for the recovery of any debt, to be sued or prosecuted against any person or persons aforesaid, in any of the King's Courts at *Westminster* or elsewhere, out of the said court of requests, the plaintiff shall declare for any sum of money, not amounting to the sum of 40s., the defendant may plead generally in bar of such action, that at the time of commencing such action the defendant was inhabitant and resident within the said city and liberty of *Westminster*, or that part of the dutchy aforesaid, and was liable to be warned or summoned before the said court of requests, without pleading any other matter specially; and in case the plaintiff in any such action shall declare for the sum of 40s., or any sum of money exceeding the sum of 40s., the defendant may plead generally (over and above such matters as aforesaid,) that the defendant was not, at the time of commencing such action, indebted to the plaintiff in any sum or sums of money amounting to the sum of 40s., without pleading any other matter specially, whereto the plaintiff shall or may reply generally, and deny the matters pleaded as aforesaid; and if the plaintiff be nonsuited, or discontinue his action, or verdict pass against him, or judgment be given on demurrer, the defendant shall have full costs.

1833.

MAYER v. JADIS.

WESTMINSTER,
Feb. 9.

INDORSEE against drawer of two bills of exchange for 2000*l.* and 500*l.* respectively.

The bills were drawn payable to the order of the drawer, who indorsed in blank. The next indorsement was by one *Richardson*, and then followed the plaintiff's indorsement.

There was no count in the declaration stating an indorsement by *Richardson*.

The bills were put in and read, and the plaintiff's case closed, when Sir *J. Scarlett* objected, that, *Richardson's* indorsement remaining on the bill, the plaintiff must be nonsuited.

An indorsement on a bill of exchange not stated in the declaration may be struck out after the bill has been read in evidence, and after an objection has been made on account of the variance.

Campbell S. G. applied to have the bills returned, to strike out *Richardson's* indorsements.

Sir *J. Scarlett*. The bills are in the custody of the Court, and I never, in the whole course of my experience, knew leave given to strike out an indorsement after the bill was read.

DENMAN C. J. allowed the bills to be handed back, and the indorsement to be struck out.

Verdict for the plaintiff.

Campbell S. G. and *Addison* for the plaintiff.

Sir *J. Scarlett* and *Kelly* for the defendant.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN C. P.

AT THE SITTINGS AFTER
HILARY TERM,
3 W. IV. 1833.

ADJOURNED SITTINGS AT WESTMINSTER.

1833.

VEAL v. NICHOLLS.

Where an agreement and a writing described therein as annexed to it, contain together more than 1080 words, a 35s. stamp is required, although in fact the writing was annexed to the agreement after it was executed.

ACTION for excessive distress.

The defendant tendered in evidence an agreement, having only the common agreement stamp upon it. The agreement contained 1056 words, but an inventory was annexed to the agreement, containing more than twenty-four words. The body of the agreement made mention of the inventory, and described it as "*hereunto annexed.*" The inventory was duly stamped as an inventory.

Wilde Serjt., for the plaintiff, referred to the schedule of the stat. 55 G. 3. c. 184. *part* 1. tit. *Agreement*, by which a duty of 1*l.* is imposed on every agreement, &c. "*together* with every sche-

dule, receipt, or other matter put or indorsed thereon, or annexed thereto, when the *same* shall not contain more than 1080 words; and an additional duty is imposed when the *same* shall contain more than 1080 words." The inventory in the present case was annexed to the agreement, and the words contained in the inventory are therefore to be counted in estimating the amount of the stamp required; and the number of words in the agreement and inventory together exceeding 1080, he contended that the instrument offered in evidence ought to have been stamped with the higher duty.

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 VEAL
 v.
 NICHOLLS.

Merewether Serjt. for the defendant, re-examined his witness, and proved by his evidence, that at the time when the agreement was executed, the inventory was not in fact annexed to the agreement, but had been annexed at a subsequent time; and he, therefore, contended that the instrument did not require the larger stamp. The circumstance, that the agreement made mention of the inventory as "annexed," was not conclusive: the fact being proved to be, that it was *not* annexed at the creation of the instrument, which was the date to look to in ascertaining the amount of the stamp. It was to be observed, also, that here the writing supposed to be annexed was itself stamped with the stamp assigned to it by law.

TINDAL C. J. The circumstance of the inventory being stamped as an inventory, cannot make any difference in the question; the point in dispute is, whether the *agreement* be duly stamped. If

1833.
 VEAL
 v.
 NICHOLLS.

the inventory is to be considered as annexed to the agreement, then the agreement requires the additional stamp. I am of opinion that the inventory is to be considered as so annexed.

The parties speak of it in the agreement itself *as annexed*, and I think they are estopped from now saying it was not.

Evidence of the agreement was accordingly rejected, and the plaintiff had a verdict.

Wilde and Spankie Serjts., and Hutchinson for the plaintiff.

Merewether Serjt. and Wallinger for the defendant.

See *Lake v. Ashwell*, 3 East, 326. *Attwood v. Small*, 7 B. & C. 390.

WESTMINSTER.
 Feb. 11.

WALKER v. RAWSON.


Where money is paid into Court in an action of *indebitatus assumpsit*, for work and labour, and the work was all done under one contract, the defendant is precluded from saying that he contracted with the plaintiff, and another party who ought to have been a co-plaintiff.

INDEBITATUS assumpsit, for work and labour. This was an action, brought by the plaintiff, a civil engineer, against one of the committee of the *Bradford and Leeds* Rail Road Company, to recover the amount of the plaintiff's charges for surveying and marking out, &c. the intended line of road, &c.

The defendant had paid money into Court, and the principal ground of defence was, that the plaintiff's charge was excessive.

and another party who ought to have been a co-plaintiff.

It appeared in evidence that the plaintiff had been employed jointly with one *Burgess*; and, thereupon, it was insisted for the defendant, that the action was improperly brought in the name of *Walker* alone.

1833.

 WALKER
 v.
 RAWSON.

Wilde Serjt., for the plaintiff, relied on the defendant's having paid money into Court, which was an admission of his being liable to the plaintiff on the record.

Jones Serjt. That would be so, if there had been a special count setting out the contract; no doubt, payment of money would then admit the contract as stated in the declaration. But where there are only the *indebitatus* counts, the only admission made by paying money into Court is an admission that the defendant is indebted in the amount actually paid in. *Seaton v. Benedict*, 5 Bing. 28.; and he cited the words of *Best* C.J. in that case.

TINDAL C. J. (Stopping *Wilde* Serjt. in answer.) The present case is different from that cited. There the action was brought to recover the price of goods supplied to the defendant's wife; each article might there be treated as the subject of a separate contract; and the payment of money might therefore admit a liability as to some articles, and leave others disputed. But here, if the defendant is liable in respect of any of the work done, he is liable in respect of the whole of the work, for the contract was *one*: and the only question is, whether it was made with the plaintiff alone, or with the plaintiff and *Burgess* jointly. Now, the de-

1833.

WALKER

v.

RAWSON.

fendant being sued by the plaintiff alone, pays money into Court, and thereby admits that he is content to treat the contract as made with the plaintiff only.

I certainly therefore shall not nonsuit the plaintiff, but the defendant shall have leave to move, if he pleases.

Verdict for the plaintiff for full amount.

Wilde Serjt. and *Talfourd* for the plaintiff.

Jones Serjt. and *Baines* for the defendant.

No motion was made to disturb the verdict.

ADJOURNED SITTINGS IN LONDON.

GUILDHALL,
Feb. 12.

SCOTT v. NEWINGTON.

If a person having a lien on goods wrongfully parts with them, the owner's right to the possession revives, and he may maintain trover for them.

TROVER for certain china jars.

The jars were the property of the plaintiff, who had lodged with Mr. *Hisburn*, and had left the jars as a lien for some arrears of rent. *Hisburn* pledged the jars, and they were found in the possession of the defendant, but by what means the defendant got them did not appear; no title was, however, set up under *Hisburn*. The plaintiff's attorney demanded the jars of the defendant, and they were refused; he was also authorized by *Hisburn*, and demanded for both.

It was contended for the defendant, that as *Hisburn* had a lien unsatisfied on the jars, the

plaintiff had no right to the possession, and the action ought to have been brought by *Hisburn*.

1833.

 SCOTT
 v.
 NEWINGTON.

TINDAL C. J. I think not. If a person having a lien, abuses it by pledging the goods, the owner's right to the possession revives, and he may maintain the action. But you may move upon it.

Verdict for the plaintiff.

Bompas Serjt. and *Gale* for the plaintiff.

Comyn for the defendant.

No motion was made to disturb the verdict.

Howes v. Ball, 7 B. & C. 481. *Montague on Lien*, 24.

KIRTON v. WOOD.

GUILDHALL,
 Feb. 15.

ASSUMPSIT on an apothecary's bill with the usual money counts. Pleas, general issue and set-off.

It was proved that the plaintiff had attended a child of the defendant's, and supplied medicines to the amount of 10*l.*, and a bill had been delivered to this amount. The defendant had a counter bill against the plaintiff, but the amount did not appear. The defendant, on being applied to, said, if the plaintiff would send a receipt for his bill, he would send in his (the defendant's) counter bill and pay the difference. There was no proof of the plaintiff's being an apothecary; and upon its being

The defendant's admission of something being due, without specifying how much, does not entitle the plaintiff to a verdict for nominal damages on an account stated. On that count the amount must be shown.

1833.

KIRTON

v.

WOOD.

objected that the plaintiff must be nonsuited for want of proof of his qualification,

Bompas Serjt. contended, that the promise to pay supplied the deficiency, and entitled him to a verdict on the account stated.

TINDAL C. J. Assuming that the promise would supply the deficiency, still there is nothing to shew what the difference which the defendant promised to pay is ; it is clear, the plaintiff is not entitled to the whole sum, and on an account stated, you must shew some precise sum.

Nonsuit.

Bompas Serjt. and *Erle* for the plaintiff.

Jones Serjt. for the defendant.

See *Teal v. Auty*, 2 Brod. & B. 99.

GUILDHALL,
Feb. 22.

SHUTTLEWORTH v. NICHOLSON.


A party appearing in person must examine the witnesses, as well as address the jury. Counsel can only be heard to assist him on legal objections.

CASE for a libel.

The defendant announced that he intended to defend himself; but after the first witness had been examined in chief, *Taylor* rose to cross-examine him, when

TINDAL C. J. interfered and said, that if counsel examined or cross-examined the witnesses,

they must conduct the defence throughout. There could not be a partition of labour between the bar and the party. If the defendant meant to address the jury, he must examine the witnesses. It would be very derogatory to the dignity of the bar, and otherwise mischievous, to allow a counsel to make out the facts from the witnesses, and afterwards for a defendant to state what he chooses to the jury.

1833.

 SHUTTLE-
 WORTH
 v.
 NICHOLSON.

Taylor claimed to be allowed to assist in matter of law.

TINDAL C. J. If any matter of law arises, I shall be glad to hear you ; this, on which we now are, is fact.

Taylor, at the conclusion of the plaintiff's case, argued that, in point of law, there was no case to go to the jury ; but the objection was overruled, and the defendant addressed the jury.

Verdict for the plaintiff, 150*l*.

Wilde, *Spankie*, Serjts., and *Mirehouse* for the plaintiff.

Defendant in person.

1833.

SPRING ASSIZES, 3 W. IV.

WINCHESTER.

Coram PARK J.

Feb. 28.

REX v. SMITH.

A permanent building used and slept in only for a short time, for the purpose of a fair, may be treated as the dwelling-house of the person so occupying it, in an indictment for burglary, though unoccupied the rest of the year.

INDICTMENT for burglary.

The building alleged to have been broken and entered was a permanent one of mud and brick on the down at *Weyhill*, used only as a booth for the purposes of the fair, for a few days in the year. It had wooden doors, and windows bolted inside, and the prosecutor rented it for the week of the fair, and he and his wife slept there every night of the fair, during one night of which the offence was committed.

PARK J. (after consulting *Littledale J.*) held that this was a sufficient dwelling-house for the purpose of burglary.

The prisoner was convicted.

Greenwood for the prosecution.

Dampier for the prisoner.

But burglary cannot be committed in a mere tent or booth erected in a market or fair. 4 Bl. Com. 225., 1 Hale, 557., 1 Haw. c. 38. s. 17.

1833.

WINCHESTER.
Coram LITTLEDALE J.

REX v. EDWARD.

Feb. 28.

INDICTMENT for robbery.

The money was obtained from the witness by a threat to accuse her husband of an unnatural offence, and the money so obtained was the property of the husband, the prosecutor.

Obtaining money from a wife under threat of accusing her husband of an unnatural offence, is not robbery.

LITTLEDALE J. said the case was new and perplexing. He thought it was rather a misdemeanor. To make a case of this description a robbery, the intimidation should be on the mind of the person threatened to be accused, and the apprehension of the wife was of a different character. The 7 & 8 G. 4. c. 2. s. 7. is in terms confined to threats made to the party himself. (a) The principle is, that the person threatened is thrown off his guard, and has not firmness to resist the extortion; but he could not apply that principle to the wife of the party threatened. Even as a misdemeanor, the case was new, though he thought that the only way to treat the offence. He therefore directed an acquittal.

The prisoner was acquitted, and afterwards tried for the misdemeanor, but acquitted from the non-appearance of the prosecutor.

Saunders for the prosecution.

The prisoner was undefended.

(a) See *R. v. Dunkley*, R. & M. C. C. R. 90.

1833.

EXETER.

Coram PARK J.

March 18.

PEDLER v. PAIGE.

A deed attested by a witness become blind, may be read, on proof of the witness's writing, without calling him.

DEBT on bond.

Pleas, *non est factum*, and release by a lost deed.

For the defence, it was proposed to put in evidence an instrument witnessed by a person proved to be blind, and whose handwriting was also proved.

For the plaintiff, it was objected, that it was still necessary to call the witness, in order that the circumstances attending the execution might be proved by him after hearing the lease and his attestation described, that being the object for which an attesting witness was selected.

Follett, contra, cited *Wood v. Drury*, 1 Ld. Ray. 734., 1 Starkie, 337., Roscoe, 64.

PARK J. There is great weight in the reasons urged for calling the witness, but under the authority of the case cited, I shall receive the evidence.

Verdict for defendant.

R. Bayley and *Crowder* for the plaintiff.

Wilde and *Coleridge* Serjts., and *Follett* for the defendant.

1833.

TRIST v. JOHNSON.

March 18.

ASSUMPSIT.

For the defence, a letter, written to the plaintiff's attorney and (as was stated) in answer to one from him relating to the cause, was called for under notice to produce served during the assizes.

Notice to produce must be served before the commission day on parties living away from the assize town.

The cause was tried on *Monday*, the commission day was the *Friday* before, and the notice was served in Court on the *Saturday*, on the plaintiff's attorney, who lived forty miles off.

It was objected that the notice was served too late.

Follett. The letter relates immediately to this cause, and the attorney must be supposed to have brought it amongst the other papers in this cause.

PARK J. I certainly think the notice ought to be served before the commission day of the assizes, to enable the party to bring the papers required. That is the practice, and it has been recently so decided.

Verdict for the plaintiff. (a)

Wilde Serjt. and *Moody* for the plaintiff.

Follett and *Bere* for the defendant.

(a) See the next case.

1833.

EXETER.

Coram LITTLEDALE J.

March 20.

REX v. ELLICOMBE.

Notice to produce served on a prisoner during the assizes, two days before the trial, is insufficient to let in secondary evidence.

INDICTMENT for setting fire to a dwelling-house with intent to defraud the trustees of the *Sun* Fire Insurance Company.

There were other counts with different allegations as to the intent.

The counsel for the prosecution proved by parol that the prisoner effected a policy with the *Sun* Fire Office, and notice to produce this policy was served on the prisoner in gaol, in the assize town, on *Monday* at eleven o'clock.

The assizes commenced on the *Friday* preceding, and the trial took place on *Wednesday*. The policy was then called for. The prisoner's residence was ten miles from the assize town.

For the prisoner, it was objected, that the notice was too late, and *Trist v. Johnson, suprd*, p. 259. was cited; and it was contended, that the principle laid down in that case applied more strongly to this, where the party was in prison, and had no means, however near his residence, of procuring the papers.

LITTLEDALE J., after consulting with *Park* J., said, that the notice was too late. In civil cases, the rule was this; notice to produce should be served before the assizes, when the party lived

away from the assize town, in order that he may have an opportunity of bringing the paper demanded; and if notice served after the assizes commenced was too late in a civil case, *a fortiori*, in a criminal case, where the party was in prison at a distance from his home, it must be so.

1833.
 Rex
 v.
 ELLICOMBE.

The case proceeded on the other counts, and the prisoner was acquitted.

Greenwood and Sewel for the prosecution.

Moody and Cockburn for the prisoner.

TAUNTON.
Coram LITLEDALÉ J.

Doe d. GALLOP v. VOWLES.

April 3.

THIS ejectment was brought to recover certain property which was mortgaged in 1755, and the question in the cause was, whether the defendant had been in possession adverse to the mortgagee for upwards of twenty years. In order to prove that the mortgagee had interfered with and repaired the premises, a carpenter's bill *debiting* the mortgagee, with a receipt thereon in the carpenter's writing for work done on the premises, was offered in evidence. It was proved that the carpenter was dead, and that the bill and receipt came from the papers of the mortgagee in the hands of his representative.

A deceased tradesman's bill for repairs, with his receipt thereon, is not evidence of the work having been done for the person charged, though the paper is found amongst the other papers of the person charged.

1833.

Doe d.
GALLOP
v.
VOWLES.

This evidence was objected to by the counsel for the defendant, on the ground that the paper taken alone was not within the principle on which all the cases had gone, namely, that the writing was against the interest of the writer. Here it was only stated on the face of the paper, that money which had been owing was paid, and this left the writer just in the same situation as before, there being no other evidence of the debt but the statement, and that statement being equally evidence of the payment.

Wilde Serjt. contended that it had been over and over again decided, that such entries and papers which raised the demand and discharged it, were evidence of reputation. That the man-midwife's case was precisely in point.

LITTLEDALE J. The cases have gone quite far enough. There would be no limit, if such a paper as this were admitted. I think the paper inadmissible.

Verdict for the defendant.(a)

Wilde Serjt. and *Escott* for the plaintiff.

Coleridge Serjt. and *Erle* for the defendant.

(a) In *Higham v. Ridgway*, (the man-midwife's case,) 10 East, 109., which is the nearest case to the present, the work done for which the entry of charges was marked paid, was proved by other evidence than the entries, and this fact is relied on by Lord *Ellenborough* in giving judgment.

1833.

YORK.
Coram ALDERSON J.

SIDDALL v. RAWCLIFF.

March 9.

ASSUMPSIT on a joint and several promissory note made by the defendant and two others *A. B.* and *C. D.*, dated in *July* 1825, for 100*l.*, payable with interest to the plaintiff on demand.

Plea, general issue.

The plaintiff was a trustee for a benefit society. *A. B.* was a member of the society. Upon occasion of the society's lending 100*l.* to *A. B.*, he signed and gave them the promissory note in question; the present defendant and *C. D.* also signing it as sureties for *A. B.* The loan was made to *A. B.* on the understanding that it should be repaid by quarterly instalments.

For the defendant evidence was given, that in 1830 (there being then an arrear of 17*l.* 10*s.* due from *A. B.* to the society) an action had been brought on the note by the present plaintiff against the present defendant, and *A. B.* and *C. D.*

The proceedings in that action were abandoned by the plaintiff, upon an agreement by the present defendant to give a *cognovit* for the said sum of 17*l.* 10*s.*, adding the amount of other instalments which had accrued due since the commencement of that action, together with the costs. The pro-

Where a promissory note purports to be payable on demand, but was in truth given to secure the repayment of money by instalments,—the payee having already brought an action on the note, and taken a *cognovit* for the instalments then due, cannot maintain a second action for default in payment of the subsequent instalments.

1833.

SIDDALL
v.
RAWCLIFF.

ceedings in the former action were given in evidence, as was also the *cognovit*, (which recited the agreement as before stated,) and a receipt dated 31st of *January* 1831, headed “*Siddall v. A. B. and others*,” signed by the plaintiff’s attorney, and expressing that he had received from the now defendant the sum of 40*l.* 6*s.* 8*d.*, “the amount of *debt* and *costs* in this action.”

The present action was brought to recover other instalments which had subsequently become due from *A. B.*

Under these circumstances, it was contended for the defendant, that the acceptance of the *cognovit* and the subsequent receipt of the money, operated as a complete bar to the present action.

Alexander and Dundas, contra, insisted that the plaintiff had a right to put the note in force against the defendant, upon every accruing default on the part of *A. B.*

ALDERSON J. A former action having been brought upon this note and a recovery obtained against the defendant (for the taking a *cognovit* from him and accepting the amount of the same was equivalent to a recovery), I think the plaintiff cannot maintain this action. He is trying to treat this as if it were a bond; if he could do so, the revenue would be defrauded: a note might be so framed as to meet the intention of the parties; but it would require a higher stamp. If this action could be maintained, it would follow that the plaintiff might sue the defendant upon default in payment of

the next instalment also, and so on as each instalment became due.

Nonsuit, with leave to move.

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SIDDALL
v.
RAWCLIFF.

Alexander and Dundas for the plaintiff.

Blackburn for the defendant.

No motion was made to set aside the nonsuit.

BAYNTUN v. CATTLE.

YORK,
March 11.

ASSUMPSIT for money paid, &c.

Plea, general issue.

The plaintiff had been a candidate to represent the city of *York* in parliament, at the election which took place in the year 1830. The defendant had acted as his agent on that occasion; and the present action was brought to recover from him the balance of money paid to him as such agent, after giving him credit (as was alleged) for all the disbursements he had made in respect of the election.

To prove that the defendant had received the monies with which he was charged, the plaintiff put in evidence an account which the defendant had sent to him: one side of it admitted receipts by the defendant, and the other side purported to contain the disbursements he had made. On the

1. Money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by the principal, if the principal was at the time aware of the illegal disbursements, or if he subsequently assented to them.

2. Payment by a candidate at an election for a member of parliament, of the expenses of taking up the

freedom of his voters, is illegal.

3. *Semble*, It is illegal for a candidate to pay the travelling expenses of a voter.

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face of the account a balance appeared to be due to the defendant.

The following were some of the items entered under the head of disbursements by the defendant: —

	£	s.	d.
“ Conveyance of <i>London</i> voters			
home again to <i>London</i> - -	992	0	6
“ <i>Hull</i> voters’ return conveyance -	602	8	3
“ Corporation freedom fees - -	176	3	6
“ 1185 <i>Christmas</i> boxes - - -	1185	0	0”

The plaintiff insisted that several of the sums alleged to have been disbursed by the defendant had not, in fact, been disbursed; and, with a view to falsify the account in this respect, he called (amongst others) witnesses who proved that the charges made for the return conveyance of the voters were much more than the actual expense of their conveyance could have been.

The defendant, on the other hand, insisted that the plaintiff had not only admitted that the defendant had disbursed the money placed in his hands, — but, that supposing some of the items of disbursement to be open to objection, still the plaintiff was fully aware of the nature of those disbursements, and had assented to them, — and could not therefore now recover back the money from the defendant; and some letters written by the plaintiff to the defendant were put in evidence in support of this defence.

The defendant also proved, that while the election in question was going on, the plaintiff was at *York*, and was heard to complain of the

defendant as being too “niggardly,” and said, he wished the election to be carried on with more spirit and expense; and at another time, he made a similar complaint, and said, “*he wanted to be at the head of the poll, cost what it would.*”

In explanation of the item for *Christmas* boxes, it was attempted to be shewn to be the custom at *York* to give 2*l.* for each plumper at an election, and 1*l.* for a split vote.

ALDERSON J., in summing up to the jury, (after referring to the attempt made to falsify the Defendant’s account in point of fact, and telling them, that, if they thought that the plaintiff had succeeded in so falsifying it, he was entitled to their verdict,) proceeded thus:—If you think the plaintiff has not falsified the account in point of fact, then the question is, whether the disbursements made by the defendant were legal, or whether (admitting them to be illegal) the plaintiff was aware of the nature of the disbursements, and nevertheless acquiesced in them. First, then, are the disbursements legal? Now, upon that point, there can hardly be any doubt. Take, for instance, the items for the sums alleged to have been paid to the voters for their travelling expenses home. It is clear from the evidence, that the sums paid to those voters under pretence of paying their expenses, in fact bore no sort of proportion to their actual expenses. They were clearly calculated on some other principle, and one can hardly doubt what that was. If, indeed, the voters had only been paid their actual expenses, a difference of opinion has

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existed as to the legality of such payments (a): some committees of the House of Commons having held that such payments are legal; others (and probably theirs is the more correct opinion) that such payments are *not* legal; for it is obvious that such a mode of proceeding, if allowed, would lead to great abuses. Then, again, as to money paid for the expenses of taking up the freedom of some of the voters; this payment, also, in my opinion, is clearly illegal. [*Jones Serjt.* referred to the decision of the committee on the *Worcester* case. (b)] With great respect for the tribunal by which the payment was there held to be legal, I have, myself, no doubt that it was an illegal payment. The *Christmas* boxes form an item admitting of no disguise; it is impossible to close one's eyes to the meaning of an item, charging 1185*l.* for 1185 *Christmas* boxes.

Then, the only question remaining is, Did the plaintiff know of, and authorize, these illegal payments? If he did not, he has a right to recover the amount in this action; for if a person entrusts money to an agent, to be by him laid out in legal disbursements, but the agent chooses to lay out part of the money in disbursements which are *not* legal, he cannot claim credit for those disbursements when he comes to settle with his employer. Looking to all the facts of the case, — the letters written by the plaintiff, and the expressions used by him during the election, — you are to say whether the plaintiff did or did not know that these

(a) See *Shepherd's Summary of Election Law*, p. 57.

(b) Reported in *Male on Elections*, p. 352.

illegal practices were resorted to for the purpose of carrying his election ; or whether he did or did not subsequently assent to them when brought under his observation, for such subsequent assent would be equal to a ratification of the whole proceeding. If this should be your opinion, your verdict must be for the defendant, otherwise, for the plaintiff.

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Verdict for the defendant.

Jones Serjt. and S. Martin for the plaintiff.

F. Pollock, Cresswell, and Alexander for the defendant.

COPE v. COPE.

YORK.
March 15.

THIS was an issue out of Chancery, to try whether *Willis Cope* was one of the legitimate children of *Richard* and *Elizabeth Cope*.

It appeared that *Richard* and *Elizabeth Cope*, at the time of the birth of *Willis Cope*, were living in a very humble situation of life in a small village in *Yorkshire*. After having five children, (whose legitimacy was undisputed,) the husband, a few years before the birth of *Willis Cope*, went to work as a labourer on the *Wolds*,

1. On an issue to try the legitimacy of a party born of a married woman, since dead, declarations by her that he was not the son of her husband, but of another man, are not admissible ; nor are such declarations

of the husband admissible.

2. A baptismal register, in which the party is described as the illegitimate son of his mother, is admissible evidence on the trial of such an issue.

3. Where the husband has had opportunity of access to his wife at a period which admits of his having then begotten the child born of her, he is presumed to have done so. But that presumption may be rebutted by strong circumstances to shew that the husband did not have sexual intercourse with his wife.

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at some considerable distance from the village; but during all that time, and up to the very time of the birth of *Willis Cope*, and for some time afterwards, the husband was in the habit of from time to time returning to the village where his wife and children continued to live; he used to return once in every month or six weeks, and usually remained there from *Saturday* until the *Sunday* evening or *Monday* morning. A witness deposed to having seen him in the house where his wife lived several times after the birth of the child. It was also proved, that on one occasion the husband sent money to his wife. There was no evidence of any quarrel having taken place between them.

For the defendant, (who was the party denying the legitimacy of *Willis Cope*,) evidence was given that a man of the name of *John Willis* was living within a very short distance of the house where the mother, *Elizabeth Cope*, lived; that he was frequently seen at the house, and was sometimes brought there at night drunk, and remained there until next morning; that he was in the habit of giving money to the wife about the time of the birth of the child *Willis Cope*, and for some time afterwards; that he, *John Willis*, had applied to tradesmen with a view to getting *Willis Cope* taken by one of them as an apprentice; that *Willis Cope*, when young, had been in the habit of speaking of *John Willis* as his father. The defendant also offered in evidence the baptismal register of *Willis Cope*, which was in the following terms:—

“ 1794. Dec. 7. *Willis*, illegitimate son of *Elizabeth Cope*.”

The entry was proved to be in the handwriting of the clergyman of the parish, who was still living; at the present time he was in advanced years, but not incapable of coming to *York*.

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J. Williams, for the plaintiff, objected to the reception of this evidence; the register is evidence that on the day mentioned *Willis* was baptized: so far it is an entry purporting to be made in pursuance of the incumbent's duty, but beyond this, it is not evidence; for instance, if the entry states the time of the *birth* of the child, that would be no evidence of the age (*a*), because that is an enquiry which the incumbent is neither required nor authorized to make. So, here, the clergyman who made the entry had no authority to enquire into the legitimacy of the child.

ALDERSON J. said an entry precisely similar had been received in evidence in *Morris v. Davies*, where the property in dispute was of great amount, and where every available point had been taken. (*b*) He should therefore receive the evidence, but the degree of weight which it ought to have with the jury was, of course, a very different point. (*c*)

(*a*) *Wiher v. Law*, 3 Stark. N. P. C. 63.

(*b*) Reported in 3 Carr. & P. 215. 427. On reference to the short-hand notes of the trial, which took place at the Summer assizes for *Gloucester* in 1828, *coram Gaselee J.*, it appears that the entry in the register, which was there received in evidence without opposition, was in the following terms:—“*Evan Williams*, a base child, was baptized 11th of *January* 1793;” and a note was added, in the rector's hand, “supposed of *Austen*, the weaver of this town's son.”

(*c*) *Vide infra*, p. 276.

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The defendant then offered evidence of declarations made by the wife when she received the money of *John Willis*, and which declarations were in substance admissions that he was the father of the child.

J. Williams objected to this evidence.

F. Pollock, *Jones Serjt.*, and *Wightman*, *contra*. The declarations of the wife are admissible evidence. The fact may be supposed to be peculiarly within her own knowledge, and from the necessity of the case, her testimony (if she be alive), and evidence of her declarations made *antelitem motam* (if she be dead), are receivable in evidence; thus, in *Rex v. The Inhabitants of Bromley* (a), the mother was allowed to prove the illegitimacy of her children; and in *Rex v. Reading* (b) (which was an appeal against an order of filiation, Lord *Hardwicke* agreed that the mother (though a married woman) was a competent witness to prove the criminal conversation between the reputed father and herself. They cited also *Rex v. Luffe*. (c)

ALDERSON J. The declarations of the wife are not admissible. She is an admissible witness to prove (for some purposes) the fact of her having had connexion with a person not her husband, or to prove other facts, from which inferences may be drawn as to the legitimacy or illegitimacy of

(a) 6 T. R. 330.

(b) Rep. temp. Hardw. 82.

(c) 8 East R. 193.

her child (*a*); but she is not allowed herself to prove the illegitimacy of the child, as by shewing non-access, &c. It would be opening a door to evidence of the most dangerous description; and in those cases where the wife is allowed to be examined as a witness to prove connexion with a third party, I do not know that her declarations even to that extent have ever been received.

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The evidence was rejected.

The defendant, at a subsequent period of the trial, tendered evidence also of declarations made by the husband as to the illegitimacy of *Willis Cope*.

J. Williams objected to this evidence.

(*a*) The only case in which the wife is allowed to prove connexion with another person than her husband, seems to be upon an order in bastardy; and there not for the purpose of proving the child a bastard — for to this she is incompetent, — but for the purpose of showing who is the father of the child proved by other evidence a bastard; and to enable the justices to make the order of maintenance. It is true that, in *Rex v. Reading*, Rep. temp. Hardw. 83., the counsel in support of the order cited a case (*Rex v. The Inhabitants of St. Andrew's, Holborn*), where *Parker C. J.* is reported to have been of opinion that the wife was good evidence to prove that the children born of her did not belong to her husband, but to another person; it does not, however, distinctly appear that the wife was the only witness to prove the non-access in that case; but if she was, and if the Chief Justice expressed an opinion that her unsupported testimony was sufficient, that opinion appears to be completely overruled by the decision of the Court in *Rex v. Reading*.

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Jones Serjt. and *Wightman* attempted to distinguish the declarations now objected to from those of the wife, contending that the principle of public policy which excluded the testimony of the wife, did not apply in equal degree to the case of the husband.

ALDERSON J. One ground upon which Lord *Hardwicke* rested his opinion in the case of *The King v. Reading* (a), as to the inadmissibility in that case of the mother's declaration to prove the child's illegitimacy, was, that it would be dangerous to allow her to give evidence which would have the effect of discharging her husband of the burden of maintaining the child. That argument applies, of course, *a multo fortiori*, to the declarations of the husband himself. I observe also that the books take a distinction between allowing the parents to prove the illegitimacy of a child, by shewing that there was no valid marriage, and allowing them to prove it by shewing non-access. Lord *Mansfield* does not put it on the same ground as Lord *Hardwicke*, but treats it as a rule founded in decency and morality, that the parents shall not be allowed to say after marriage that they have had no connexion, and, therefore, that the offspring is spurious. (b) I shall reject the declarations, but you shall have leave to move.

The evidence was rejected.

(a) Rep. temp. Hardw. 83.

(b) See *Goodright v. Moss*, Cowp. 594.

In summing up, his Lordship said to the jury, There are three propositions which I shall lay down to you as law, and you will find your verdict accordingly.

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1. If a child be born after the marriage of the mother, and during her husband's life, that child is, in point of law, to be *presumed* to be legitimate: but that presumption may be rebutted by evidence.

2. The presumption of the child's legitimacy in the case put, is rebutted, if it be shewn that the husband had not access to his wife within such a period of time before the birth of the child as admits of his having been the father. But if he had opportunities of access, — (by which I mean opportunities of having sexual intercourse with his wife,) — it is to be presumed that he availed himself of those opportunities, unless he be shewn to be impotent.

3. But then, thirdly, even where the husband is shewn to have had these opportunities of access, and was not impotent, still this presumption also (of sexual intercourse) may be rebutted; as where the wife is living in open and notorious adultery, and the husband on one single occasion only had opportunity of access to her, and then at a time, and under circumstances, rendering it extremely improbable that he availed himself of the opportunity, those facts might perhaps be urged as a reasonable ground for concluding that sexual intercourse did not take place; the case of *Morris v. Davies* was decided on that principle: the Lord Chief Baron coming to the conclusion, that the open adultery of the wife, and her concealing the

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birth from the husband, and other circumstances, led to the inference that no intercourse had taken place between the husband and the wife.

But, in considering this question, you ought to be very careful in examining the evidence, and to have such cogent proof before you, as leaves no doubt in your mind, that the husband did not avail himself of the opportunity of intercourse. And if once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shewn that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father. (a)

In commenting on the evidence which had been brought forward, the learned Judge told the jury that the statement in the baptismal register, which had been put in, could only be treated as evidence of the reputation in the village. It was not proved on what ground, or by whose procurement, the entry had been made; and it was to be recollected, that if the entry had been made by the procurement of the mother, it would not be admissible evidence at all, any more than her declaration.

Verdict for the plaintiff.

J. Williams, Cresswell, and Wrangham for the plaintiff.

F. Pollock, Jones Serjt., and Wightman for the defendant.

(a) See *Head v. Head*, 1 Sim. & Stu. 152. 1 Turn. 139.; and the *Banbury Peerage* case, 1 Sim. & Stu. 153.

1833.

WOOD *v.* PRINGLE. (a)K. B.
GUILDHALL,
Feb. 27.

THIS was an action for a libel.

There were several special pleas of justification as to certain parts of the libel; but there was no plea of the general issue. And as to the parts of the libel not covered by the special pleas, judgment was suffered by default.

Replication to the special pleas, *de injuriâ*, &c.

Campbell S. G., for the defendant, claimed the right to begin. The defendant not having put a plea of the general issue upon the record, the only matter in dispute was the truth of the justification; and as to that issue, the affirmative was with the defendant, who had to prove the allegations in his plea; and he cited *Cooper v. Wakley*. (b)

In an action for a libel, when there is no general issue, but a justification is pleaded as to part, and judgment is suffered by default as to the residue, the plaintiff is entitled to begin.

DENMAN C. J. (stopping Sir *James Scarlett* on the other side.) There are parts of this publication as to which no issue is joined between the parties, but judgment has been signed by default for want of a plea. As to that part of the case, therefore, the plaintiff is entitled to begin, by shewing the amount of the damages he has sustained; and having the right to begin as to part, he has the general right to begin.

(a) This case was unavoidably omitted in its proper place.

(b) M. & M. N. P. C. 248.

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WOOD

v.

PRINGLE.

Sir *James Scarlett* accordingly opened the plaintiff's case.

Verdict for the plaintiff. (a)

Sir *James Scarlett*, *Coleridge* Serjt., and *Follett* for the plaintiff.

Campbell S. G. and *R. V. Richards* for the defendant.

(a) See *Fowler v. Coster*, M. & M. N. P. C. 241.; *Cotton James*, ib. p. 273.; *Pearson v. Coles*, *suprà*, p. 206.; *Morris Lotan*, p. 233.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B. C. P. AND EXCHEQUER,

AT THE SITTINGS AFTER

TRINITY TERM,

3 W. IV. 1833.

ADJOURNED SITTINGS IN KING'S BENCH.

PARRY *v.* MAY and MORRIT.

1833.

GUILDHALL,
July 10.

ASSUMPSIT for work and labour, and the usual money counts.

The action was brought for builder's work performed on premises belonging to Lord *Winterton*. It was stated that the defendant had contracted with Lord *Winterton* for the whole work on the premises, and had employed the plaintiff on his own credit to do the work in question.

Notice to produce a written contract between the defendant and Lord *Winterton*, had been given to the defendant, and it was shewn that the contract had been deposited in the hands of one *Little*, common agent of Lord *Winterton* and the defendant. On the contract being called for, and not produced, secondary evidence of its contents was offered.

Secondary evidence of a document, to produce which notice has been given, is not admissible, where the document is held by a stakeholder between the party in the cause and a third person.

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PARRY

v.

MAY and
MORRIS.

Campbell (S. G.) objected to the evidence. He said it was necessary to shew that the document called for was in the defendant's custody; whereas here it was not in the hands of the party to this suit, but in those of a third person, whose duty it was not to deliver it to the defendant, but to retain it for the benefit of Lord *Winterton*. *Little* ought to have been subpoenaed to produce it. The defendant has no right of possession.

Sir *J. Scarlett*. The defendant has a sufficient control over the instrument: actual possession is not necessary; here *Little* is his agent, and there is nothing to shew that Lord *Winterton*, or any body else, would object to *Little's* letting him have it.

LITLEDALE J. In order to let in secondary evidence the instrument need not be in the actual possession of the party; it is enough if it is in his power, which it would be, if in the hands of a party in whom it would be wrongful not to give up possession to him. But he must have such a right to it, as would entitle him not merely to inspect but to retain; that is not so here, because even if the document were given to the defendant for the purpose of this cause, it must be returned.

Secondary evidence of the document was rejected.

Verdict for the plaintiff.

A rule to set aside the verdict as against evidence, has been since obtained.

Sir *J. Scarlett* and *R. V. Richards* for the plaintiff.
Campbell (S. G.) and *Maule* for the defendant.

1833.

ADJOURNED SITTINGS IN THE COMMON PLEAS.

CARTER *v.* JONES.

GUILDHALL,
July 6.

THIS was an action for a libel, in which there was no plea of the general issue ; but there were several special pleas which justified the whole of the libel.

The plaintiff is entitled to begin where damages of an unascertained amount are the object of the action, though the affirmative of the issues on the record be with the defendant.

M. D. Hill, for the defendant, thereupon claimed a right to begin, the affirmative of the issues lying on him.

TINDAL C. J. A resolution has recently been come to by all the Judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant.

The plaintiff thereupon opened his whole case, and called his witnesses.

Verdict for the plaintiff.

Wilde Serjt. and *Platt* for the plaintiff.

M. D. Hill and *Kelly* for the defendant.

1833.

WESTMINSTER,
June 18.

ADJOURNED SITTINGS IN THE EXCHEQUER.

TAIT v. HARRIS and Two Others.

In an action of trespass against several, the plaintiff having proved a joint trespass committed by all the defendants, cannot waive that, and give evidence of another trespass committed by only one defendant.

THIS was an action of trespass. The first count was for breaking into certain apartments of the plaintiff, and taking goods therefrom. The second count was for a false imprisonment.

Plea, not guilty.


The plaintiff proved a trespass committed by all three defendants in taking the goods, as stated in the first count. He also proved an imprisonment, as stated in the second count; but the evidence as to that part of the case only affected one of the defendants.

Follett, for the defendants, objected, that the plaintiff, having, in the first instance, proved a joint trespass against all the defendants, could not now abandon that, and proceed on the several trespass of one; and he said that such had been the rule constantly acted upon by Lord *Tenterden* -

Erle, for the plaintiff, contended that, as there were two counts, he had a right, at any time during the trial, to elect on which he would go to the jury.

Lord LYNDHURST C. B. Where a joint trespass is alleged, and proved, the plaintiff cannot after -

wards elect to go upon a separate trespass against one. If there had been only an unsuccessful attempt to prove a joint trespass, the plaintiff might afterwards elect to go for the several trespass; but not where the joint trespass has been proved. The plaintiff must, therefore, in this case, confine himself to the trespasses committed by all three defendants.

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 v.
 HARRIS and
 OTHERS.

Erle accordingly addressed the jury upon the evidence applicable to the joint trespass, as laid in the first count; and upon that count the jury found a

Verdict for the plaintiff, with nominal damages.

Erle for the plaintiff.

Follett and *Barstow* for the defendants.

See *Sedley v. Sutherland and Others*, 3 Esp. 202., *Stante Prickett*, 1 Camp. 473.

1833.

SUMMER ASSIZES, 4 W. IV.

YORK.

Coram DENMAN Ld. C. J.

July 22.

CARTWRIGHT and Ux. v. WILLIAM SMITH and THOMAS BATTY.

It is not necessary that a party seizing goods fraudulently removed (under stat. 11 G. 2. c. 19. s. 7.) should first call to his assistance an ordinary peace-officer: it is sufficient if he be assisted by a person appointed a special constable for the occasion.

THIS was an action of trespass for an assault upon the female plaintiff.

There was a plea of justification under the statute 11 G. 2. c. 19. s. 7, alleging that the plaintiff *Cartwright* (the husband) held certain premises as tenant to one *George Smith*, at a certain rent; that rent being in arrear, the two plaintiffs had fraudulently removed certain goods, in order to prevent the landlord from distraining. Wherefore the defendant *Thomas Batty*, as bailiff of the said *G. Smith*, and by his command, having called to his assistance the said other defendant *W. Smith*, who was then and there a constable duly authorized and appointed, and having jurisdiction at the said place in which, &c., and who was then and there the agent of the said *G. Smith*, and acting by his authority, and said *W. Smith*, as such agent, having then and there made oath before *W. J. Bagshaw*, Esq., then and there being a justice, &c. followed the goods within thirty days. The plea then alleged, that at the said time when, &c. the female plaintiff was in the act of fraudulently removing

and concealing part of the goods, whereupon the defendants gently laid their hands upon her to prevent her, &c.

Replication, *de injuriâ*.

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v.
SMITH and
BATTY.

It appeared that the defendant *W. Smith* was a relation of the landlord *G. Smith*, and was not a regular peace-officer; but that he had been appointed, by the magistrate's warrant, a special constable for this particular occasion.

J. Williams, for the plaintiffs, thereupon objected, that the defendant *W. Smith* was not a constable or peace officer within the spirit of the act of parliament (11 G. 2. c. 19. s. 7.), nor according to the fair construction of the defendants' plea. (a) The object of the legislature in requiring the presence of a peace-officer must have been to prevent affrays in cases of this kind, by interposing the presence of an authorized and known conservator of the peace. Nothing was more likely to lead to a different result, than the course here taken, of investing a partisan with the character of a special constable for a purpose of this kind.

DENMAN Ld. C. J. was clearly of opinion, that the directions of the act of parliament were sufficiently complied with. There was nothing in the act to render it necessary that the constable should

(a) The words of the act (s. 7.) are, "first calling to his assistance the constable, headborough, borsholder, or other peace officer of the hundred, borough, parish, district, or place, where the same goods shall be suspected to be concealed."

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 {
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 v.
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 BATTY.

be an ordinary peace-officer. It was enough that he had a warrant duly constituting him a constable for this purpose.

It was also objected, that the defendants had given no evidence in proof of the allegation in their plea, that the defendant *Batty* had called the other defendant, *W. Smith*, to his assistance. It was, however, shewn that the defendant *W. Smith* had, in other instances, been known to assist *Batty*, as bailiff, in making distresses, &c.; and the Lord Chief Justice thought this sufficient to support the allegation in the plea.

Verdict for the plaintiffs.

J. Williams and *Baines* for the plaintiffs.

F. Pollock and *Milner* for the defendants.

DURHAM.
 Coram BOLLAND B.

July 30.

REX v. The Inhabitants of BISHOP
 AUCKLAND.

Inhabitants
 rated, or liable
 to be rated,
 for the high-
 ways, are in-
 competent
 witnesses for
 the district
 indicted for
 the non-
 repairs of a
 highway.

THIS was an indictment against the township of *Bishop Auckland*, for not repairing a highway.

For the defendants, a witness was called, who, on the *voire dire*, admitted that he was an inhabitant rated to the highway rate for the township, and liable to pay the same.

Cresswell, for the prosecution, objected that the

witness was incompetent; and cited *Oxenden v. Palmer*. (a)

Alexander, contra, relied upon the words of the statute 54 G. 3. c. 170. s. 9.; and cited *Heudebourck v. Langston* (b), and *Rex v. Hayman*. (c)

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 The INHABITANTS of
 BISHOP
 AUCKLAND.

BOLLAND B., on the authority of *Oxenden v. Palmer*, held, that the witness was incompetent.

Verdict, not guilty. (d)

Cresswell for the prosecution.

Alexander for the defendants.

(a) 2 B. & Adol. 236. (b) 1 M. & M. 402. (c) Ibid. 401.

(d) Another indictment was preferred against the inhabitants of the same township, which came on to be tried at the Spring assizes, 1834, before *Alderson J.* On this occasion, several persons were called for the defence, who, on the *voire dire*, admitted themselves to be inhabitants of the township, and rated to the highway rates; and others, who admitted their liability to be rated, but stated that their names had not been included in the last rate.

Cresswell objected, that the witnesses were incompetent; the objection was the same, whether the witnesses were rated, or only liable to be rated. It is clear, that the witnesses would have been incompetent before the stat. 54 G. 3. c. 170.; and that statute does not apply to a case like this, inasmuch as it is not a case relating to the rates or cesses: and he again relied on *Oxenden v. Palmer*, 2 B. & Adol. 236.

Alexander and *Watson* for the defendants, cited *Heudebourck v. Langston*, 1 M. & M. 402., and *R. v. Hayman*, 1 M. & M. 401. The present question *does* relate to the rates; for if the township is acquitted, the rates will be less.

ALDERSON J. The safest way is to abide by the words of the act of parliament. I cannot say, looking to these words, that the present "is a matter relating to the rates or cesses."

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ANTS of
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I therefore shall reject the evidence of the witnesses, as well those who are only liable to be rated, as those who are actually on the rate.

The defendants were found guilty.

Cresswell for the prosecution.

Alexander and *W. H. Watson* for the defendants.

In *Easter* term, 1834, *Alexander* moved the Court of King's Bench for a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the witnesses ought not to have been rejected by the learned Judge; or else, why the judgment should not be arrested, on an alleged error in the form of the indictment; and he went into an examination of the cases, contending at length that *Oxenden v. Palmer* was an incorrect decision.

The Court took time to consider, saying, they would look more fully into the act of parliament before they decided the case; and on a subsequent day, the Lord Chief Justice said that the Court was of opinion the evidence had been properly rejected; but, on the other ground, they granted a rule to shew cause why the judgment should not be arrested, which was afterwards made absolute.

IN THE COURT OF COMMON PLEAS AT LANCASTER.

Coram BOLLAND B.

August 16. DOE, on the demise of JOHN TAYLOR, v.
OLIVER MILLS.

The statute
25 Geo. 2.
c. 6. makes
void a devise
to an attesting
witness,
although there
be three other
attesting wit-
nesses to the
will.

EJECTMENT to recover a dwelling house.

The lessor of the plaintiff claimed the property in question as heir-at-law of *John Taylor* deceased.

The defendant claimed it as his devisee.

The testator, by his will dated 25th of *December* 1828, executed in the presence of and attested by the defendant, and also three other witnesses, devised the property to the defendant.

The defendant put in the will, and proved it by calling one of the other attesting witnesses, who spoke to the execution of it in the presence of himself and the three other witnesses.

For the lessor of the plaintiff, it was contended, that the devise was void under the stat. 25 G. 2. c. 6., by the first section of which act (after referring to the stat. of frauds) it is enacted, "That if any person shall attest the execution of any will or codicil which shall be made after the 24th day of *June* in the year of our Lord 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act; notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil."

Alexander, for the defendant, insisted that the statute was clearly intended to apply only to cases where the evidence of the devisee was wanted for the purpose of supporting the will. In the present case, there were three credible witnesses independently of the defendant (the devisee); the devisee's attestation might be dispensed with altogether, and considered as struck out.

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 DOR dem.
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BOLLAND B. thought the words of the statute were conclusive, and directed the jury to find a verdict for the lessor of the plaintiff. He, however, reserved the point, and gave *Alexander* leave to move upon it.

Verdict for the plaintiff.

F. Pollock and *Wightman* for the plaintiff.

Alexander for the defendant.

Alexander accordingly moved the following morning before the Lord Chief Justice *Denman*, and obtained a rule *nisi* to set aside the verdict on the point reserved.

In the course of *Hilary* term, 1834, cause was shewn against the rule before Lord *Denman* C. J. and Mr. Baron *Bolland*, by

Wightman. He relied upon the words of the statute, which, he said, were so plain and express, that it was quite impossible to support the devise.

Alexander, on the other hand, admitted that the words of the enactment were, in themselves, such as would undoubtedly extend to this case and invalidate the devise: he admitted, also, that he had been unable to find any case which could be cited as an authority upon the point now raised. But he contended that the present case was not within the mischief intended to be remedied. The statute was passed in consequence of the decision of the Courts of law upon *Anstey's* case. (a) 'There it was held, that a person taking an interest under a

(a) *Strange's Rep.* 1253.

not a competent witness to establish that
id, as it was apprehended that such a doc-
s likely to shake the validity of many wills,
lature passed this act, which (after reciting
ite of frauds as to devises of lands, and add-

“doubts had arisen who were to be deemed
tnesses within the intent of the said act,”)

in effect, to make a devise to an attesting
void. The object was to let in the attest-
ess’s evidence to prove the execution ; but
e evidence of the fourth witness is wholly
sary, and the object, therefore, contemplated
egislature does not present itself. [Lord

C. J. You assume too much ; the evi-
f the devisee was not wanted on this par-
occasion ; but it might be wanted on other
s : supposing all the other subscribing wit-
hould die, would not the evidence of this
nterested witness then become necessary ?]
jection must be considered with reference
ate of things which exists at the time it is
here, when the objection is raised, the due
on of the will is sufficiently established

true that the late Master of the Rolls (Sir
Grant) ruled, that a legacy to a subscribing
was void under the statute, though the will
ed personal property only, and therefore did
ire any witness (*a*), but later decisions seem
ice with that case. *Emanuel v. Constable.* (*b*)
Brett. (*c*)

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Lees v. Summersgill, 17 Ves. jun. 508.

Russ. Rep. 436.

(*c*) 3 Addam’s Rep. 210.

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LORD DENMAN C. J. I did not entertain much doubt upon this case, when the motion was made at *Lancaster* for a new trial. I thought then that the words of the statute were too peremptory to be got over, and I think so still. The exclusion of the evidence of attesting witnesses to wills, where those witnesses happen to be devisees, was felt to be a great inconvenience — and the legislature thought proper to take this method (certainly a somewhat violent method) of remedying the inconvenience. The case is within the very words of the statute, and it is by no means made out that it is not within the mischief too. In regard to the cases which have been last cited, they are distinguishable from the present case : in those cases the will was of personalty only : here the will is of real property. It is unnecessary, therefore, to give any opinion upon the propriety of those decisions.

BOLLAND B. The case before Sir *W. Grant* seems to go the full length of the present. It was there held, that the legacy to the subscribing witness was void, although the will respected personalty only, and the attestation was consequently unnecessary. That case appears to have been much considered by the very learned Judge who decided it ; and he states in his judgment, that he had enquired into the practice of the Ecclesiastical Courts upon the subject. I should, therefore, be slow to over-rule that authority. (a) It appears to me that

(a) From the judgment delivered by Sir *John Nicholl*, in *Brett v. Brett*, 3 Addam's R. p. 228., it would appear that the Master of the Rolls was misinformed as to the practice of the Ecclesiastical Courts : and that in those courts, at least, it had

this case falls completely within the operation of the act, and that the verdict was therefore correct.

Rule discharged.

Wightman for the plaintiff.

Alexander for the defendant.

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LUCAS and Another, Assignees of OLDHAM,
a Bankrupt, v. WORSWICK.

August 22.

ASSUMPSIT for money lent by the plaintiffs as assignees, and for money had and received by the defendant to the use of the plaintiffs as assignees.

Plea, *non assumpsit*.

The action was brought to recover back a sum of 20*l.* 10*s.* which the plaintiffs had overpaid the defendant, under an alleged mistake of facts. The circumstances were in substance as follows: —

Oldham became a bankrupt in *March* 1831, and since that time the plaintiffs, with the sanction of the other creditors, carried on for their general benefit the business of calico-printers, formerly carried on by the bankrupt. The defendant had been occasionally employed by the assignees to engrave rollers for them, for the purposes of the manufactory; and in the month of *April* 1832, he sent in his bill, amounting to 142*l.* 7*s.* 6*d.*, for engraving six rollers; a dispute arose between the parties respecting one item (of 45*l.*) included in the bill, to which the plaintiffs insisted they were not fairly subject, the rollers having been badly engraved. Before this dispute was settled,

Assumpsit for money had and received, lies to recover money paid by the plaintiff under a forgetfulness of facts which were within his knowledge.

not been usual to consider the statute as extending to wills of mere personalty.

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 {
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the defendant applied for money on account; and Mr. *Lucas* (one of the plaintiffs) accordingly paid him, on the 1st and 8th of *May*, two sums on account, which amounted together to 20*l.* 10*s.* (the sum now sought to be recovered). On the 18th of *May*, Mr. *Lucas*, the defendant, and *Oldham* the bankrupt, happened to meet at the counting-house of the assignees, and after some discussion between them, the defendant agreed to give up the item of 45*l.* Mr. *Oldham* then taking up the bill of the defendant, deducted the 45*l.* from the bill, making the balance 97*l.* 7*s.* 6*d.* instead of 142*l.* 7*s.* 6*d.*; and the defendant immediately signed the account, so altered. On the same day that this arrangement took place, the defendant called on the plaintiff, *Lucas*, for payment, and *Lucas* paid him the agreed balance of 97*l.* 7*s.* 6*d.*; but almost immediately afterwards he sent the defendant notice that, when he did so, he had forgotten that he had already paid the defendant the two sums (amounting together to 20*l.* 10*s.*) on account; and that, consequently, he ought, on discharging the balance, to have paid him, not 97*l.* 7*s.* 6*d.*, but only 76*l.* 17*s.* 6*d.*: he therefore required the defendant to return him the 20*l.* 10*s.* The defendant's clerk answered, that the defendant did not consider he had received more than he was entitled to; and the defendant had subsequently refused to repay the sum demanded.

Under these circumstances, *F. Pollock*, for the defendant, contended, that as the money had been paid by *Lucas*, one of the plaintiffs, voluntarily, and as all the facts were at the time within his knowledge, he could not now recover the money back.

BOLLAND B. reserved the point, directing the jury to find a verdict for the plaintiffs, if they were of opinion that the real agreement between the parties was, that the full amount of the charge for engraving the rollers was to be deducted from the defendant's bill.

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 ———
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Verdict for the plaintiffs, damages, 20*l.* 10*s.*

F. Pollock, on the following morning, obtained a rule *nisi* to set aside the verdict and enter a non-suit, on the ground taken at the trial; against which

Alexander shewed cause in the course of *Hilary* term following, before the Lord C. J. *Denman* and Mr. Baron *Bolland*. He contended, that it was in this case clear that the plaintiffs had paid the money under a mistake, and equally clear that the defendant had no ground or claim in conscience for retaining it. He submitted, therefore, that, on the principle laid down by Lord *Mansfield* in *Bize v. Dickinson* (a), the plaintiffs were entitled to recover the money back. The same rule is laid down by Lord *Mansfield* in *Moses v. M'Farlane* (b), by *Ashhurst J.* in *Chatfield v. Paxton* (c), by Sir *James Mansfield C. J.* in *Brisbane v. Dacres* (d), by *Chambre J.* and *Gibbs J.* in the same case (e), and by *Abbott C. J.* in *Wilkinson v. Johnston*. (g)

The cases deciding that money voluntarily paid is not recoverable, have all been cases where the money has been paid under a legal process, as in *Marriott v. Hampton* (h) and *Hamlet v. Rich-*

(a) 1 Term R. 285.

(b) 2 Burr. R. 1012.

(c) 2 East's R. 471. n.

(d) 5 Taunt. 157.

(e) *Id.* 154. 158.

(g) 3 B. & C. 434.

(h) 7 Term R. 269.

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ardson (a); or under threat of suit, as in *Knibbs v. Hall* (b); or under a *bonâ fide* claim of right, as in *Brisbane v. Dacres* (c); or merely from ignorance of the law, as in *Bilbie v. Lumley* (d); or where the transaction has been of an illegal character, and the parties stood *in pari delicto*, as in *Browning v. Morris* (e); or where the money paid was due in honour and conscience, though not legally recoverable, as in *Turner v. Arundel*. (g) He cited also *Milnes v. Duncan*. (h) The present case did not fall within the principle of any of those where the money has been held not to be recoverable.

F. Pollock, contra. The rule is perfectly well established, that where money has been paid by a party voluntarily, and with full knowledge, or even means of knowledge, of the facts, he cannot afterwards recover it back: *Milnes v. Duncan*. (i) *Bilbie v. Lumley* decides the question. The facts were here all within the knowledge of the party who made the payment now sought to be revoked. He had himself done the act on the 8th of May, of which it is pretended he was ignorant on the 18th. It would be a most inconvenient doctrine, if a party were allowed to shew that, though he had knowledge of the facts, he had them not present in his memory at the moment he paid the money.

Feb. 4.

The learned Judges took time to consider the case: and on this day delivered their judgment,—

(a) 9 Bingh. 644.

(c) 5 Taunt. 143.

(e) Cowp. 790.


(h) 6 B. & C. 671.

(b) 1 Esp. 84.

(d) 2 East's R. 469.

(g) 2 Black. R. 824.

(i) 6 B. & C. 677. (per Bayley J.)

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Alexander for the plaintiffs.

***Pollock* for the defendant.**

REX v. DANIEL BRITTON.

July 12.

on the defendant being called on to plead to this indictment, his counsel objected, that he was bound by recognizances to appear to an indictment which had been found at the previous term against him for embezzling and concealing his effects under the commission, and that the same facts were intended to be adduced against him on this indictment as on the other; unless that indictment were quashed, or otherwise disposed of, he ought not to be forced to plead to this.

the only distinction between the two indictments (which were admitted to apply to the same

A prosecutor cannot maintain two indictments for misdemeanor for the same transaction: he must elect to proceed with one, and abandon the other. The balance-sheet of a bankrupt, given on oath under his commission, is not admissible against him on a criminal charge.

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offence) was, that the second indictment contained a series of counts charging the defendant with not disclosing and not delivering over his effects, in addition to the count charging him with concealment and embezzling,—both indictments being on the face of them good.

PATTESON J. (after consulting *Alderson J.*) said, that the proper course would be, as he had no power to quash either indictment, to call on the prosecutor to abide by the event of this indictment; that unless he agreed not to proceed further with the first, this should not be proceeded with: that Mr. Justice *Alderson* agreed with him, that both indictments ought not to hang over the defendant. If the prosecutor could show any prejudice in proceeding with this now, he would respite the recognizances till next assizes.

The prosecutor agreed not to go on further with the first indictment, and the trial proceeded.

After endeavouring to prove the petitioning creditor's debt by other means, the counsel for the prosecution offered in evidence the defendant's balance sheet on the file of proceedings signed by him; and proved that to have been delivered by him to the assignee ten days before it was signed and sworn to by him. This was offered as an admission by the defendant of the existence of the debt which was therein stated.

It was objected, for the defendant, that the proceedings under the commission could not, in any way, be given in evidence to affect the defendant, until the validity of the commission was established. At all events, that the defendant's

examination, under which the balance sheet was given in, being compulsory and on oath, could not be brought forward to affect him criminally, as it was obtained from him under a sort of duress.

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It was answered, that as against the defendant, any declaration of his must be admissible: that the fact of the examination being on oath, was not such a duress as to exclude the admission; and *Rex v. Mercer*, 2 Stark. R. 366. was cited. (a)

PATTESON J., after again consulting *Alderson J.*, said, he was clearly of opinion that the balance sheet could not be evidence against the plaintiff to prove the petitioning creditor's debt.

Not guilty.

Erle and *Jardine* for the prosecution.

Bompas Serjt. and *Barstow* for the defendant.

(a) As to this case, see *R. v. Gilham*, R. & M. C. C. R. 203.

EXETER.

Coram ALDERSON J.

DICKINSON v. FOLLETT.

July 25.

ASSUMPSIT on the warranty of a horse.

The warranty was admitted. The horse had been kept and used by the plaintiff as a carriage horse (for which purpose he was bought) about a month, and was then tendered to be returned as unsound.

Mere badness of shape, though rendering the horse incapable of work, is not unsoundness.

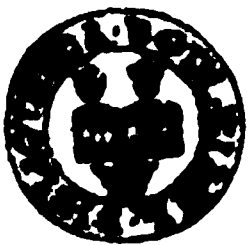
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It was admitted that the horse was unsound at that time, but there was conflicting evidence whether the unsoundness existed at the time of the sale, or whether it arose from some subsequent cause; and, on the other hand, a veterinary surgeon, called for the defendant, after giving his opinion that the lameness arose from a recent injury, stated also, that the horse was so ill formed, from turning out one of his fore legs, as to be incapable of work to any extent without cutting so as to produce lameness.



Follett, in his reply, contended, that, at all events, the horse was unsound from this malformation; that a horse so ill formed as to be incapable of the ordinary usefulness of a horse, was unsound.

ALDERSON J., on summing up, said, that the horse could not be considered unsound in law, merely from badness of shape. As long as he was uninjured, he must be considered sound. When the injury is produced by the badness of his action, that injury constitutes the unsoundness. His Lordship then put the other parts of the case to the jury, who found a

Verdict for the defendant.

Follett and *Bere* for the plaintiff.

Wilde Serjt. and *Coleridge* Serjt. for the defendant.

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 BRIDGEWATER.
 Coram ALDERSON J.

COLSTONE *v.* HISCOLBS.

August 11.

REPLEVIN for a horse.

Plea, that the horse was the property of one *Ruel Hinton*, and not of the plaintiff, as in the declaration is supposed, with a conclusion by a verification.

Replication, that the horse was not the property he said *S. H.*, but of the plaintiff. Conclusion the country, and issue thereon.

Where a defendant in replevin pleads property in a third person, and issue is taken thereon, he is entitled to begin.

Barstow, for the plaintiff, contended that he was entitled to begin, the plea being a mere denial of allegation in the declaration, namely, the property of the plaintiff, and therefore in the nature of a general issue.

Erle and *Moody* for the defendant, maintained that the affirmative proof lay on the defendant that the horse was the property of *Hinton*; and that, in order to defeat the action, it was not sufficient for the defendant merely to disprove the property of the plaintiff.

ALDERSON J., after consulting *Patteson* J., called on the counsel for the defendant to begin.

Verdict for the defendant.

Barstow and *Stone* for the plaintiff.

Erle and *Moody* for the defendant.

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BRISTOL.

Coram ALDERSON J.*August 14.*BISS *v.* MOUNTAIN.

The first vendor of a horse warranted sound is not competent to prove soundness for his vendee in an action brought against him on a subsequent sale with warranty.

ASSUMPSIT on the warranty of a horse.

The alleged breach of warranty was a cough.

The defence was, that the cough had been contracted since the sale, and the defendant offered, as a witness on his behalf, the person who had originally sold the horse with a warranty to the defendant, for the purpose of showing that it was sound at the time of the previous sale by him.

Wilde Serjt. objected to his testimony without a release.

Merewether Serjt., in support of his competency, argued that a verdict for the plaintiff would not be evidence in an action at the suit of the defendant against the witness, and that it did not follow that the witness would be liable in case of the defendant's failure; and he cited the case of *Briggs v. Crick*, 5 Esp. 99. The cases of *Barker v. Barker*, 1 Wight. 397.; *Nix v. Cutting*, 4 Taunt. 18.; *Ward v. Wilkinson*, 4 B. & A. 410.; *Lewis v. Peake*, 7 Taunt. 153.; were also referred to in argument.

ALDERSON J. was of opinion, that, as the effect of a verdict for the defendant would be to relieve the witness from an action at the suit of the latter, he was incompetent.

The witness was accordingly rejected.

Verdict for the plaintiff.

Wilde Serjt. and *Follett* for the plaintiff.

Merewether Serjt. and *Smith* for the defendant.

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See the twenty-sixth section of the stat. 3 & 4 W. 4. c. 42., to which the Royal Assent was given on the day that this case was tried; but it would seem that the question of the witness's competency, in a case like the present, would not be affected by that enactment. (See *Burgess v. Cuthill*, *infra*.) See also 1 Starkie on Evid. 110., and *Baldwin v. Dixon*, *supra*, p. 59.; in which case Lord Tenterden seems to have been of opinion that a witness (under circumstances exactly like those of the principal case) was not incompetent. In order to exclude a witness, on the ground of his being liable over to the party who calls him, it seems not to be enough to show that the witness *may* be liable over; the facts should appear which show that he *would* be liable. (See *Larbalistier v. Clarke*, 1 B. & Adol. 899.) In the principal case no facts appear, which showed that the witness would necessarily be liable over to the defendant, supposing a verdict to pass against the latter. It is presumed, therefore, that the witness would be competent to prove for the defendant any matter merely collateral to the witness's own liability; as, for instance, to disprove the warranty by the defendant. The question, however, may be considered as varied by the particular point to which the witness was called to speak, viz. the soundness of the horse at the time when the witness sold it: it is to be assumed that that point had become the material point in the cause; and if so, the issue was in substance upon the question of the witness's liability over, so as to bring the case within the principles of the ordinary one of a servant being held incompetent for his master, in an action against the latter, for the alleged misconduct of the witness: *Morish v. Foote*, 8 Taunt. 455.

C A S E S
ARGUED AND DETERMINED
AT NISI PRIUS,
IN K. B.

AT THE SITTINGS AFTER
MICHAELMAS TERM,
4 W. IV. 1833.

ADJOURNED SITTINGS AT WESTMINSTER.

1833.

Dec. 9.

BURRELL *v.* NICHOLSON.

TRESPASS for taking goods.

Plea, that the plaintiff was occupier of a house in the parish of *St. Margaret's, Westminster*; the plaintiff was rated in respect of his house the poor, under a certain act of parliament; he refused to pay, and thereupon a warrant issued by certain magistrates to levy the arrears of the rate, directed to the defendant, who was constable of *St. Margaret's, Westminster*; and justified taking the goods as a distress under warrant.

Replication, that the plaintiff's house was situate within the parish of *St. Margaret's Westminster*.

The *Solicitor-General*, for the defendant, asked a right to begin, as the affirmative of the issue lay upon the defendant.

Where real damages are not the object of the action, the party on whom the affirmative issue lies is entitled to begin. *Quære*, Whether a new trial can be obtained, on the ground that a party has been improperly deprived of his right to begin?

Sir *James Scarlett*, for the plaintiff. Under 24 G. 2. c. 44. s. 6., the plaintiff is bound to prove a demand of a perusal and copy of the warrant of distress; such demand does not depend upon the pleadings. Secondly, the substance of the issue is, whether the place where the plaintiff's house is situate be extra-parochial or not, and that is affirmative on the part of the plaintiff. Moreover, there is a question of damage, which, under the rule recently agreed upon by the learned Judges, entitles the plaintiff to begin, upon whichever party the issue may, in point of form, lie.

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Campbell S. G. We admit the demand of the warrant and the amount of damages; it comes, therefore, to a mere question of title.

LORD DENMAN C. J. It is impossible not to see that this is a mere question of right. The rule promulgated by the Judges applies to cases where damages are the object of the action, and a justification, putting the issue on the defendant, is pleaded—there the plaintiff is to begin. But the case here is different; it is a mere question of right, and therefore the defendant must begin, as the affirmative is on him.

The defendant began, and obtained a verdict.

Sir *J. Scarlett*, *Follett*, and *W. H. Watson*, for the plaintiff.

Campbell S. G. *J. Williams*, *J. Jervis*, and *Pratt*, for the defendant.

In the next term, Sir *James Scarlett* moved for a new trial, on the ground (amongst others), that

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v.
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according to the form of the pleadings and the practice of the Court, the plaintiff ought to have been allowed to begin. The Court took time to consider whether they would grant a rule to show cause; and on a subsequent day, the Lord Chief Justice said, that the Court doubted whether, under any circumstances, a new trial ought to be granted, upon the ground that the Judge presiding at *Nisi Prius* had come to an incorrect decision upon a point of this kind. It seemed rather a matter of practice and regulation for the presiding Judge to exercise his discretion upon, than one which the Court in Bank were to determine as a matter of law. But at all events, the Court was of opinion that, in the present instance, the defendant had been properly considered entitled to begin; the Court, therefore, refused a rule to show cause why the verdict should not be set aside, on that ground, but on the other grounds urged by Sir *J. Scarlett*, they granted him a rule.

1833.

REX, on the Prosecution of The Honourable
W. P. T. L. WELLESLEY, v. DERBISHIRE,
Esq.

GUILDHALL,
Dec. 18.

THIS was an indictment for an assault.

The case had been set down for trial at the sittings after *Michaelmas* term 1832, shortly previous to which the prosecutor had obtained a rule for a special jury, and a special jury had been accordingly struck, and the case marked for a special jury. Just before the case would have come on to be tried at those sittings by the special jury, the prosecutor withdrew his record.

Where the plaintiff or prosecutor has obtained and struck a special jury, and has withdrawn his record, the defendant may take down the record by proviso, and claim a trial by a common jury.

The defendant now brought the case down by proviso, having a day or two before obtained an order from the Lord Chief Justice to have the indictment tried by a common jury; but upon the case coming on in its turn as a common jury cause,

R. V. Richards, for the prosecutor, moved the Lord Chief Justice to rescind the order which his Lordship had made for trying the indictment by a common jury. He contended, that as the case had been made a special jury case, and a special jury had been struck under the authority of a rule of Court, the words of the Jury Act (6 G. 4. c. 50. s. 30.) were express, that “*every jury so struck shall be the jury returned for the trial of such issue.*” The indictment could not, therefore, be tried by the present common jury, which

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v.
DERBISHIRE.

was not the jury struck under the authority of the act of parliament.

Barstow, for the defendant, insisted that, by withdrawing the record, the prosecutor had in effect waived the rule for a special jury; and he contended that as a defendant was, by the practice of the Court, entitled to carry the record down to trial *by proviso*, the consequence would be (if the prosecutor were well founded in his argument), that, by the prosecutor's making the case a special jury one, the defendant would be ousted of this right.

LORD DENMAN C. J. was of opinion, that the defendant had a right to bring on the trial on the common jury panel, and refused to rescind his order; and the prosecutor not appearing to prove his case,

The defendant was acquitted. —

R. V. Richards for the prosecution.

Barstow for the defendant.

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ADJOURNED SITTINGS AT WESTMINSTER.
IN THE EXCHEQUER.

DICAS, Gent. One, &c. v. The Right Honour-
able Baron BROUGHAM and VAUX.

WESTMINSTER,
Dec. 3.

TRESPASS for assault, battery, and imprisonment.

Plea, the general issue.

This was an action brought by an attorney against the Lord High Chancellor of *England*, to recover compensation for false imprisonment on two occasions, under two orders made by the Lord Chancellor against the plaintiff for contempt, in not paying over certain moneys to the assignees of a bankrupt.

The Lord Chancellor is not liable to an action in respect of an order of commitment made by him in bankruptcy, even admitting such order to have been irregular.

The first order was as follows: —

In the matter of James Nokes, a Bankrupt.

Whereas *George Butler*, of *Kennett* in the county of *Wilts*, ale brewer, and *Joseph Proctor*, of *Gould Square, London*, wine merchant, assignees of the estate and effects of *James Nokes*, a bankrupt, did this day prefer their petition to me, showing that, by an order made in this matter, on the petition of the petitioners, by his Honor the Vice-Chancellor, bearing date the 2d day of *February* 1831, it was ordered, that *John Dicas*, the person mentioned in the said order, should, within four days after he should be duly and personally served with the said order, pay to the petitioners the balance or sum of

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 and VAUX.

56*l.* 13*s.* 11*d.* in the said order mentioned; and it was ordered, that the said *John Dicas* should also, within the like period of four days, deliver up to the petitioners, upon oath, all papers and writings, receipts and vouchers, touching or relating to the estate of the said bankrupt, in his custody or power; and in case default should be made by the said *John Dicas*, either in payment of the said money or the delivery of the said documents, or any of them, as herein-before directed, that the said *John Dicas* should stand committed to his Majesty's prison of the Fleet: that the said *John Dicas* was duly and personally served with the said order on the 22d day of *February* last; that the said *John Dicas* had hitherto refused to pay the said sum of money, or to comply with the said order in the delivery of all papers and writings, receipts and vouchers, touching and relating to the estate of the said bankrupt, in the custody or power of the said *John Dicas*: and therefore praying, that the said *John Dicas* might immediately stand committed to his Majesty's prison of the Fleet for his contempt of the said order, and that my warrant might issue for that purpose.

Now upon reading the said petition, and the several affidavits in support thereof, and which are duly filed, I do order that the said *John Dicas* do stand committed to his Majesty's prison of the Fleet, and that a warrant of commitment do forthwith issue for that purpose.

BROUGHAM C.

Under this order, the plaintiff was arrested by one of the tipstaffs of the Court of Chancery, on the 19th of *April* 1831, whilst attending the Court

of Common Pleas as attorney in a cause then being argued before that Court. The plaintiff, at his request, was immediately taken before the Chancellor, who, on hearing the circumstances, ordered him to be discharged, on his undertaking to attend in the Court of Chancery daily till the order was disposed of; and, after discussion, this order was discharged with costs, to be allowed the plaintiff, as a set-off against the sum ordered to be paid.

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Further proceedings were had; and upon the petition of the assignees the plaintiff was ordered to pay the assignees the balance of 56*l.* 13*s.* 11*d.*, and to deliver up the papers, &c. relating to the estate of the bankrupt; and after service of this order, and demand of payment of the money, another order was made by the Lord Chancellor for commitment of the plaintiff for contempt.

On the 23d of *September*, 1831, the plaintiff was taken under the order last mentioned to the Fleet prison, where he remained till the 23d of *December*, when he was discharged under the Insolvent Debtors' Act.

It was contended for the plaintiff, in the first place, that the Lord Chancellor sitting in bankruptcy had no jurisdiction to commit for contempt, the Chancellor's authority being derived from the 6 G. 4. c. 16. (the law in bankruptcy then in force), and that statute being silent as to any such power. 2dly, That, even if there were jurisdiction, the orders were irregular and invalid, inasmuch as there had been no sufficient demand and refusal to pay, and as the second order had not been served and the service repeated in the usual manner, ac-

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and **VAUX.**

according to the practice of the Court. Witnesses were examined (and amongst them the late Lord High Chancellor *Eldon*) to prove the practice of the Court of Chancery in cases of committal for contempt.


At the close of the plaintiff's case, the *Solicitor-General* contended that the plaintiff must be nonsuited, on the ground that, even assuming the orders to be irregular, the defendant was not liable to an action, for acts done in his judicial capacity. It is clearly within the Lord Chancellor's jurisdiction to commit for contempt whilst sitting in bankruptcy. (*Anonymous*, 14 Ves. 449.; *Ex parte Bradley in the Matter of Townsend*, 1 Rose, 202.; *Ex parte Cowan*, 3 B. & A. 123.) Whatever irregularity, therefore, there may be in the orders, a judge acting within his jurisdiction cannot be liable to an action for things done by him judicially: (*Bushe's case*, 1 Mod. 119.; *Hamond v. Howell*, 1 Mod. 184.; S. C. 2 Mod. 218.)

For the plaintiff, it was answered, that the judicial privilege only extended to courts of record having common law jurisdiction, and that no case had been cited in which a court not of record had been held entitled to the privilege. (a) Secondly, that at all events the defence ought to have been pleaded, and that the case was clearly not within 21 Jac. 1. c. 12. s. 5.

Campbell, S.-G., in reply to the last objection,

(a) But see *Holroyd v. Breare*, 2 B. & A. 473. *Tindley v. Nassau*, M. & M. 52.

said, that what had been done by the Lord Chancellor judicially was not a trespass, and the defence was therefore admissible under the general issue. He was then stopped by

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 v.
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 and VAUX.

Lord LYNTHURST C. B. I have had no doubt on this case from the commencement of the argument. The plaintiff must be called; and on *Platt's* refusing to be nonsuited, his Lordship told the jury that the defendant was entitled to a verdict, which was taken, and a bill of exceptions was tendered, and agreed to be drawn up.

Platt, Kelly, Follett, and Gunning for the plaintiff.

Campbell, Solicitor-General, and *Wightman* for the defendant.

GREGORY v. TUFFS.

WESTMINSTER,
 Dec. 4.

THIS was an action of debt brought to recover the penalty of 100*l.*, under the stat. 25 G. 2. c. 36.

The second section of the statute enacts, that from and after the first day of *December*, 1752, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of *London* and *Westminster*, or within twenty miles thereof,

by the customers, for the music.

Where music is usually provided in a room in a public house, for the purpose of attracting customers, the landlord is liable to the penalties of 25 G. 2. c. 36., though nothing is paid for the music.

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without a licence had for that purpose, shall be deemed a disorderly house or place, &c.; and every person keeping such house, &c., without such licence as aforesaid, shall forfeit the sum of 100l.

On the part of the plaintiff, it was proved by two witnesses that they had, on sixteen or twenty evenings within the space of a month, visited the defendant's house, which was a public house, as customers, and that on every occasion they had found a fiddler (apparently the same person each time), playing in a room, and men and women dancing; the latter apparently of the lowest description. Liquors were handed round, each person paying for what he had; but no money was taken at the door. The men seen in the room were chiefly sailors and soldiers. On the part of the plaintiff, *Clarke v. Searle*, 1 Esp. 25.; *Archer v. Willingrice*, 4 Esp. 186., were cited.

The defendant's counsel relied on *Shutt v. Lewis*, 5 Esp. 128., insisting that the facts did not bring the case within the statute.

Lord LYNTHURST C. B. It is not necessary that this room or house should be exclusively used for the purpose of dancing or music, to bring the case within the statute; nor is it necessary that money should be taken at the door for the admission of the public. The dancing or music may be used as an inducement to customers to frequent the house; and if the room be open to the public, it will be for the jury to say whether it has been kept for the purpose of public dancing and music;

In occasional use will certainly not be sufficient.

Verdict for the defendant.

F. Pollock, Follet, and Mansel for the plaintiff.
Law (Recorder) and *Platt* for the defendant.

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GREGORY
v.
TUPPA.

BURGESS v. CUTHILL.

WESTMINSTER
Dec. 9.

THIS was an action by the indorsee against the acceptor of a bill of exchange.

The defence was, that the present bill had been accepted by the defendant as the usurious renewal of a former acceptance for a less sum; and it was admitted that both were accommodation acceptances.

The drawer was called for the defence.

Thesiger objected that he was incompetent, (*Jones v. Brooke*, 4 Taunt. R. 464.,) and that the statute of 3 & 4 W. 4. c. 42. s. 26. did not cure his objection. That statute makes a witness competent in cases where he otherwise would be incompetent, on the ground of the verdict being technically admissible in evidence against him; as where the defendant justifies under a custom, and the witness is interested in establishing that custom. But it does not apply to a case like this, where the witness has a pecuniary interest in the result of the suit, inasmuch as he is bound to indemnify the defendant not only from this verdict,

A witness liable to indemnify the defendant is not a competent witness for him, notwithstanding stat. 3 & 4 W. 4. c. 42. s. 26.

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BURGESS
v.
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but from all the consequences of accepting the bill.

Godson for the defendant. To say that the act cures the incompetency only in cases where that incompetency depends upon the technical ground instanced on the other side, is almost to destroy the operation of the act altogether. It should receive a liberal construction.

Lord LYNTHURST C. B. I think the act was not intended to apply to such cases as this. The witness cannot be examined unless he be released.

The witness was accordingly released.

Verdict for plaintiff.

Thesiger for the plaintiff.

Godson for the defendant.

COMMON PLEAS.

FIRST SITTINGS IN HILARY TERM.

1834.

WESTMINSTER,
Jan. 21.

VENAFRA v. JOHNSON.

Evidence is admissible to add to the examination of a party before a magistrate, though taken in writing.

CASE for maliciously laying an information before a magistrate that he, the defendant, apprehended danger of his life, or bodily harm, from the plaintiff, and for procuring him to be imprisoned until security was given, &c.

For the plaintiff the information of the defendant, taken in writing by the magistrate's clerk, was put in, after being proved by the clerk. After it was read, *Jones* Serjt., for the defendant, asked the clerk in cross-examination whether the defendant had not, in addition to what appeared in the information, stated that, on the occasion deposed to, the plaintiff had used a certain threat.

The question was objected to on the ground that it went to explain or add to the written information.

GASELEE J. said, that as the point was a difficult one, and of frequent occurrence, he would take the opinion of the whole Court. He accordingly consulted the Judges of the Common Pleas, who were sitting in Banco, and on his return stated that all the Judges were of opinion that evidence was admissible to prove any thing the party had said as part of his information, beyond what was put in writing, either for the purpose of explanation or addition.

Verdict for the plaintiff. (a)

Spankie Serjt. and *Moody* for the plaintiff.

Jones Serjt. and *Andrews* Serjt. for the defendant.

(a) *Rowland v. Ashby*, R. & M. N. P. C. 231. *R. v. Reid*, M. & M. 403. 2 Starkie, Evidence, 572. *R. v. Harris*, Moody's C. C. R. 338.

CASES
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AT THE SITTINGS IN AND AFTER
HILARY TERM,
4 W. IV. 1834.

SITTINGS IN TERM.

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WESTMINSTER.
Jan. 20.

Where the plaintiff offers no evidence against one of several defendants, such defendant is entitled to be acquitted at the close of the plaintiff's case.

CHILD *v.* CHAMBERLAIN and Others.

ACTION on the case for an excessive distress, with a count in trover. Plea, the general issue.

At the close of the plaintiff's case it appeared that there was no evidence against two of the defendants. *Adolphus* (insisting that these defendants had been included in the action merely for the purpose of excluding their evidence) claimed to have them acquitted before he addressed the jury for the other defendants.

Dunbar for the plaintiff said, that they were not entitled to be acquitted at this stage of the pro-

ceedings, as a matter of right; it is subject to the discretion of the Judge; and it had been so ruled by Lord *Tenterden*. (a)

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CHILD
v.
CHAMBERLAIN
and OTHERS.

PARKE J. It is now perfectly settled by the unanimous decisions of all the Judges, that when at the close of the plaintiff's case there is no evidence against a particular defendant, that defendant is then entitled to an acquittal. In consequence of the discrepancy of practice of different Judges, the matter was brought before them all, and they have determined on that rule.

At the end of the plaintiff's case the two defendants were accordingly acquitted, and called as witnesses for the remaining defendants.

Verdict for the plaintiff, 1*l.* 4*s.* 6*d.*

Dunbar and *Mansel* for the plaintiff.

Adolphus and *Clarkson* for the defendants.

(a) *Carpenter v. Jones*, M. & M. N. P. C. 198. n.; *Wright v. Paulin*, R. & M. N. P. C. 128.

Doe d. MARRIOTT v. EDWARDS and Others. WESTMINSTER,
Jan. 21.

EJECTMENT to recover possession of certain houses described to be in the parish of *St. Margaret* and *St. John*. Allegation that premises were situate in the parish of A. & B.; proof that part of the premises was situate in the parish of A. and the residue in the parish of B.: Held, a fatal variance. Amendments under the stat. 3 & 4 W. 4. c. 42. s. 23. will not be refused on the ground of the harshness of the action.

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DOE d.
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And Others.

Barstow for the defendant objected that there was no parish of that name, but that there were two parishes, one *St. Margaret* and the other *St. John*, which were only united for one special purpose, viz. the management of the poor; and that, consequently, this was a variance. *Goodtitle v. Lammerman.* (a)

Gale for the plaintiff contended that the description was divisible, and might be construed as importing that some of the houses were in the parish of *St. Margaret* and others in the parish of *St. John*. It was therefore enough if the lessor of the plaintiff could show his right to recover premises in either parish.


PARKE J. It appears to me there is a variance. Had the allegation been that the houses were in the "parishes" of *St. Margaret* and *St. John*, I should have thought the argument good in favour of the divisibility of such allegation; but here the plaintiff has mentioned only one parish, and that by a name which does not belong to any parish.

Gale then applied for leave to amend the description, under the recent stat. 3 & 4 W. 4. c. 42. s. 23.

Barstow opposed the application. It was discretionary with the Judge to grant or to refuse it; and as it appeared in evidence that this was a harsh and oppressive proceeding on the part of a land-

(a) 2 Campb. 274.

ord, who was seeking to take advantage of the forfeiture of the lease, in order to get possession of property on which his tenants had expended large sums, he submitted that the lessor of the plaintiff was not entitled to the indulgence he asked. The defendant had, in fact, come down to trial, relying on this ground of nonsuit, and should therefore at all events have his costs, if the amendment be allowed.

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PARKE J. I do not think that the supposed impropriety of the action is a consideration which ought to influence me in deciding whether I shall give leave to amend under the act of parliament. If the error in the description of the houses is one which cannot have misled the parties, I think the amendment should be allowed. As to giving the defendant his costs, as this is the first case in which the question has arisen, I will consider what is fit to be done. But, in future, parties must not come down to trial on the ground that there is a variance in the record, which they suppose a Judge will not rectify.

The amendment was made, and the defendants afterwards opening a good defence on the merits, the counsel for the plaintiff submitted to a

Nonsuit.

Gale for the plaintiff.

Barstow for the defendants.

SITTINGS AFTER TERM.

1834.

GUILDHALL,
Feb. 3.

SWINBURN *qui tam*, &c. v. JONES.

Where a declaration contains several counts founded on the same transaction, the plaintiff cannot, at the close of his case, be called upon to state on which count he relies.

DEBT to recover the penalty alleged to have been incurred by the defendant for usury in discounting a bill of exchange. The declaration contained thirty-seven counts.


At the close of the plaintiff's case, and before his principal witness (the borrower of the money) had been cross-examined by the defendant, *F. Pollock* for the defendant insisted he had a right to know upon which of the thirty-seven counts the plaintiff relied.

The Lord Chief Justice decided that he had not.

F. Pollock thereupon cross-examined the witness, and the plaintiff's case being wholly closed, he again submitted that he was, at all events, now entitled to call upon the plaintiff to declare on which count he was proceeding. It was clear that only one count could be true; and it was not reasonable, he said, that, in an action of this nature, the defendant should be perplexed by having to meet thirty-seven different charges.

LORD DENMAN C. J. I cannot call upon the plaintiff to stand upon any one count. It is admitted on all hands that only one transaction is in ques-

tion; but I think the plaintiff cannot be compelled to confine himself to any particular count upon that transaction. He has a right to leave his case generally in the hands of the jury.

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 SWINBURNE
 v.
 JONES.

F. Pollock then addressed the jury, who found a
 Verdict for the defendant.

Thesiger and *Follett* for the plaintiff.
F. Pollock and *Archbold* for the defendant.

Doe d. *PILL* v. *WILSON*.

GUILDHALL,
 Feb. 12.

THIS was an ejectment brought by the heir-at-law of one *Catharine Listers*, to recover some houses in the city of *London*.

In ejectment by heir at law against devisee, the defendant is not entitled to the reply, unless he admits the plaintiff's whole case.

The defendant claimed as devisee under the will of *Catharine Listers*. The testatrix was at the time of the will a married woman, and had power to make a will under a settlement made on her marriage. This settlement was in the possession of the plaintiff, who had refused to shew it to the defendant's attorney. The plaintiff's title not being admitted, some evidence was given of his heirship, and of payment of rent to *Catharine Listers*. Upon which the defendant's counsel admitted, that a *primâ facie* case had been made out for the plaintiff; they therefore produced and proved the will in the usual way; and called for the settlement, which was produced, vesting the estate in trustees for *Catharine Listers* during her

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life, and giving her a power to appoint in devise, and in default to the use of her right heirs.

The plaintiff, in reply, called a witness to prove that the testatrix was not of sound mind at the time of making the will.

Moody, for the defendant, claimed to have the general reply, under the authority of *Goodtitle v. Braham*, 4 T. R. 497. He contended that, in fact, he had not disputed the plaintiff's title, and was only precluded from formally admitting it, by not knowing whether, under the settlement, the estate was still in trustees or not.

F. Pollock argued that *Goodtitle v. Braham* had never been acted upon to the extent now contended for; and that unless the defendant admitted the plaintiff's whole case, he was not entitled to begin or to have the reply; and he cited *Doe dem. Tucker v. Tucker*, M. & M. 536.

Campbell Solicitor-General, and Sir *James Scarlett*, suggested, that, in their opinion, the practice had always been to require from a defendant an entire admission of the plaintiff's case, if the defendant meant to claim the reply.

LORD DENMAN C. J. said, that such had always been his own notion of the practice. Here the plaintiff's case has not been admitted; the plaintiff's counsel, therefore, is entitled to the general reply.

Verdict for the plaintiff.

F. Pollock and *Comyn* for the plaintiff.

Moody and *Tyndale* for the defendant.

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HOUSTOUN v. MILLS.

GUILDHALL,
Feb. 18.

THIS was an action of *assumpsit* to recover damages for not printing, within the time agreed upon, certain copies of a weekly newspaper, called "*The New Weekly Dispatch*," of which the plaintiff was proprietor.

The defendant was the owner of a steam-engine press, and had engaged to print off several hundred copies of the paper, of *Saturday* the 9th of *November*, in time for the post of that day.

The proprietor of a newspaper cannot recover for the non-performance of a contract for printing such newspaper, before filing the affidavit required by the stat. 38 G. 3. c. 78. s. 1.

Sir *James Scarlett*, early in the cause, urged, that the plaintiff must be nonsuited, inasmuch as he had not complied with the provisions of the stat. 38 G. 3. c. 78. The first section of that statute enacts, that "no person shall print or publish, or
" cause to be printed or published, any newspaper
" or other paper containing public news or intelligence, or serving the purpose of a newspaper,
" until an affidavit or affidavits, or affirmation or
" affirmations, made and signed as hereinafter mentioned, shall be delivered to the commissioners
" for managing his Majesty's stamp duties, at their
" head office, or to some of their officer or officers
" in the respective towns, and at the respective
" offices which shall be named and appointed by
" the said commissioners for the purpose of receiving such affidavits or affirmations (but which
" shall not be required to be upon stamped paper),
" containing the several matters and things hereinafter for that purpose specified and mentioned."

The plaintiff in this case became purchaser of

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 v.
 MILLS.

the paper for 5*l.* on the 1st of *November*, and published it on the 2d; but his affidavit filed at the Stamp Office was dated and made on the 13th of *November*. It was therefore contended, that as the act prohibits the publishing, the plaintiff could not recover : *Bentley v. Bignold*, 5 B. & A. 335. ; *Stephens v. Robinson*, 2 Cr. & J. 209.

Sir *J. Campbell* S.-G., *contra*, contended that as no illegality was contemplated in the act of publishing, and as the statute was made for other purposes, the plaintiff was entitled to recover : *Wetherell v. Jones*, 3 B. & Ad. 221. ; *Bagster v. Robinson*, 9 Bin. 77. Roscoe, 262.

Lord DENMAN C. J. I have no doubt on this point : the plaintiff contemplated an act directly prohibited ; and the law will not assist him by enforcing a contract made in furtherance of that illegal act. The plaintiff must be called.

Nonsuit.

Campbell S.-G., *G. Williams*, and *Guytch*, for the plaintiff.

Sir *J. Scarlett* and *Channel* for the defendant.

GUILDHALL,
Feb. 22.

MYNN v. JOLIFFE.

An agent employed to sell an estate has not, as such, authority to receive payment.

Communications made to an attorney by his client respecting the sale of estates are privileged. The privilege is not limited to suits existing or expected.

ASSUMPSIT to recover back the deposit paid on a contract for the purchase of an estate. There were special counts for not making a good title, and for other defaults.

To prove the payment of the deposit, the following paper was offered in evidence :—

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“Memorandum. *John Mynn* Esq. has this day given me his note of hand for 450*l.*, being on account of and in part purchase of an estate at *Sutton Valance*, bought by the said *John Mynn* of Major *Joliffe*, at the sum of 3125*l.*, upon such other conditions as the said Major *Joliffe* bought the said estate of Mr. *John Watson*.

“*December* 6. 1827. JOHN CARTER.”

Carter was proved to be the defendant's agent to sell the estate.

It was objected by Sir *J. Scarlett* for the defendant, that the paper was not evidence, without proving an authority to receive payment. An agent to sell has not authority to receive payment, unless given by the conditions of sale or other means. In general, an auctioneer has by the conditions of sale an authority to receive the deposit only ; he has no authority to receive beyond that.

LITTLEDALE J. I think that an agent employed to sell has no authority, as such, to receive payment ; but I shall not stop the cause : the defendant shall have leave to move to enter a nonsuit.

The attorney for the defendant, at the time of this transaction, and employed by him as such in the purchase and sale of estates, was called by the plaintiff, and was asked as to a communication made to him by the defendant. He was not the

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attorney in the cause, and no suit or dispute existed between the parties at the time the communication was made to him.

Sir *J. Scarlett* objected to this evidence. The communication made to the witness was made to him confidentially in his character of solicitor for the defendant. He ought not, therefore, to be called upon to disclose it.

F. Pollock contended that the privilege was limited to communications made relative to suits existing, or in contemplation in consequence of existing disputes; and Lord *Tenterden* had so ruled. (a)

LITTLEDALE J. I do not think the privilege is limited to communications made in relation to a suit in existence or expected. I think communications made in relation to the sale and purchase of estates are protected; and the question cannot, therefore, in my opinion, be asked. I so ruled in a case tried at *Gloucester*, which afterwards came before Lord *Tenterden* and the rest of the Court. No opinion was given by the Court on this point; but the case went down to trial again before Mr. Justice *J. Parke*, and he ruled in the same way as I had done, and rejected the evidence. I think also it has been so decided recently by the Lord Chancellor. (b)

(a) *Williams v. Mundie*, R. & M. 34.; and see *Broad v. Pitt*, M. & M. 233. *Clark v. Clark*, *supra* 3.

(b) *Greenough v. Gaskell*, Mylne & Keene, 98. *Bolton v.*

The question was disallowed.

Nonsuit,

F. Pollock and *Channel* for the plaintiff.

Sir *J. Scarlett* and *Platt* for the defendant.

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v.

JOLIFFE.

LEES and Another v. SMITH.

GUILDHALL,
Feb. 28.

ASSUMPSIT for work and labour, and the usual money counts.

The action was brought by the plaintiffs, who were commission merchants residing at *Boston* in *America*, to recover the excess of advances made by their agent in *London*, beyond the proceeds of goods consigned by the defendant to them for sale.

For the plaintiffs, the *London* agent was called, and it appeared on the *voir dire*, that he had given a bond for 200*l.* to the defendant, as security for the costs of the action, in case the plaintiffs should fail. He was objected to as incompetent.

A person liable by bond for the costs of the action, may be rendered competent, by depositing the penalty of the bond, as security for the costs, with the officer of the court.

F. Pollock proposed to deposit 200*l.* with the officer of the Court, as security for the costs; and contended that this would render the witness competent, in the same manner as bail are made competent by deposit. (a)

Corporation of Liverpool, ib. 88. See *Bramwill v. Lucas*, 2 B. & C. 745. *Moore v. Tyrrell*, 4 B. & Ad. 870.

(a) See *Baillie v. Hole*, M. & M. 289.

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LEES
and ANOTHER
v.
SMITH.

Lord DENMAN C. J. I think the cases are analogous, and the objection may therefore be removed in the way suggested.

The money was accordingly deposited with the officer of the Court, and the witness examined.

The plaintiff was nonsuited.

F. Pollock and *Moody* for the plaintiff.

Sir J. Scarlett for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

HILARY TERM,

4 W. IV. 1834.

BATCHELOR and Another, Assignees, &c. v.
VYSE, Esq.

1834.
WESTMINSTER,
Feb. 5.

TROVER against the sheriff of *Hertfordshire*, for selling the goods of the bankrupt under executions against him, after an act of bankruptcy.

Notice was given of the defendant's intention to dispute the trading, the act of bankruptcy, and the petitioning creditor's debt.

It was admitted by the plaintiffs that the debt upon which the fiat issued was not a sufficient debt to support it; but they relied upon another creditor's debt, which had been substituted for it

Where a new petitioning creditor's debt has been substituted under the stat. 6 G. 4. c. 16. s. 18., it is sufficient to prove the petition to the Chancellor, for the substitution of the new debt—the Chancellor's order refer-

ring the sufficiency of the debt, &c. to the Commissioner — and the finding of the Commissioner thereon. It is not necessary to produce the Chancellor's order confirming such finding.

Trover does not lie against the Sheriff to recover the value of goods sold in excess beyond what was necessary to satisfy the execution.

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by an order of the Vice Chancellor, under the 18th section of the bankrupt act, 6 G. 4. c. 16. : and as evidence of this, they gave proof, 1st, of the petition presented to the Vice Chancellor by the supplementary creditor ; 2dly, of the order of the Vice Chancellor directing the Commissioner to enquire into the insufficiency of the original petitioning creditor's debt, and the sufficiency of the debt proposed to be substituted, and if he found the original petitioning creditor's debt to be insufficient, and that proposed to be substituted, sufficient, — then to cause the same to be substituted ; and that, in such case, the commission should be proceeded in ; 3dly, of the order of the Commissioner, finding that the debt of the original petitioning creditor was insufficient, and that the debt proposed to be substituted was sufficient.

The defendant, however, objected that the plaintiffs were bound to go further, and prove the final order of the Vice Chancellor confirming the order of the Commissioner ; and it was contended that the evidence already given was merely evidence of certain interlocutory orders, which were of no avail until sanctioned by the final order of the Court.

TINDAL C. J. over-ruled the objection. (a)

The plaintiffs' case was, that the executions were fraudulently concerted between the bankrupt and the execution creditors, and therefore void ; and, further, even if this were not so, that the sheriff by

(a) See *Muskett v. Drummond*, 10 B. & C. 153.

his auctioneer had sold many more goods than were necessary for the purpose of satisfying the executions.

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There was considerable doubt as to there being any sufficient act of bankruptcy.

Wilde Serjt. for the plaintiffs, contended that they were, at all events, entitled to recover the value of goods unnecessarily sold by the sheriff, beyond what would satisfy the executions. The amount of that excess the bankrupt himself was entitled to recover; and therefore, under the 92d section of the bankrupt act, the proceedings were *conclusive* evidence of the act of bankruptcy.

TINDAL C. J. It appears to me that the plaintiffs have no right to recover for the supposed excess in the levy, under this form of action. If the sheriff has sold too much, the remedy is by a special action on the case, and not by an action of trover. (a) The real question, therefore, is, whether any act of bankruptcy has been satisfactorily proved. If the jury think none has been proved, they should find a verdict for the defendant.

Verdict for the defendant. (b)

(a) See *Phillips v. Bacon*, 9 East, 298.

(b) In Easter Term, *Wilde* Serjt. obtained a rule nisi for a new trial, on the ground,—1. That the verdict was against evidence; 2. That the ruling of the Ld. C. J. as to trover not giving for the excess in the levy was incorrect. The rule was afterwards made absolute—the Court thinking that on the former ground there was enough to call for a new trial, so that it was unnecessary to express any judgment upon the ruling of

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Wilde and Coleridge Serjts. and *Petersdorff* for the plaintiffs.

Talfourd Serjt., *W. Clarkson*, and *Butt* for the defendant.

WESTMINSTER,
Feb. 7.

GUTTERIDGE and Others v. MUNYARD
and Another.

Where a lessee covenants to keep old premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements.

THIS was an issue from the Court of Chancery.

John Stayley, by a lease dated 16th November, 1808, demised a house and premises called the *Chicken House* estate, situate at *Hampstead*, to *James Daniell*, his executors, &c., for the term of twenty-one years, at the yearly rent of 50*l.* The lessee covenanted, “that he, his executors, administrators, or assigns, should and would from time to time, and at all times during, &c., at his and their own proper costs and charges, well and sufficiently repair, uphold, support, maintain, glaze and amend, and keep the said messuage or tenement, and other the buildings, and the windows and sashes, tilings, &c., and all other the appurtenances thereby demised, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever. And should and would at the end or other sooner determination of the said demise, leave, surrender, and yield up unto the said *John Stayley*, his heirs and assigns, the said messuage or tenement, and all and singular other the premises, with the appurtenances thereby demised, so well

the *Ld. C. J.*: it would, however, appear, that the Court inclined to think, that trover *may* be supported in such a case. (See 4 *M. & S. Rep.* 552.)

and sufficiently repaired, upheld, supported, maintained, glazed, &c., and kept as aforesaid, and all new erections, buildings, and improvements that should or might be made in or upon the said premises in the meantime, (reasonable use and wear thereof in the meantime only excepted.)” Proviso for re-entry on breach of covenants.

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MUNYARD
and ANOTHER.

The plaintiffs represented *John Stayley*, the lessor above named, and the defendants were the executors of *Daniell* the lessee ; but the premises were in the occupation of under-lessees.

The plaintiffs having brought ejectments against the tenants in possession, on the ground that the interest of the lessee had become forfeited by breaches of the covenant, the defendants filed a bill in the Court of Chancery against the plaintiffs for an injunction : whereupon the Lord Chancellor directed the following issue to be tried : —

1st, Whether the said *James Daniell*, his executors, &c. did from time to time, &c. well and sufficiently repair, &c. (following the words of the covenant), according to the true intent and meaning of the said indenture ?

There were three other issues, which it is not necessary to notice.

As to the breach of the covenant to repair, it was proved that the *Chicken House* was a very old building, of the age of between two and three centuries at the least, and it was described as being now in a very dilapidated state, the walls with cracks in them, and out of the perpendicular ; the floors sunk ; many of the timbers rotten ; the tilings and woodwork of the sashes broken, &c. The tenant had painted the inside at the time of the cholera, two or three years before the trial ; but

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it did not appear that much else had ever been done to it. It did not appear that the defendants had ever been required to perform the covenants before the commencement of these proceedings.

The defendants called no witnesses; but *Wilde* Serjt. contended that no such substantial breach of covenant had been proved by the plaintiffs as could create a forfeiture; and he cited *Harris v. Jones*, *antè*, p. 173.

TINDAL C. J., in commenting on the evidence to the jury, said, Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised. If it appears that he has made these applications, and laid out money from time to time upon the premises, it would not perhaps be fair to judge him very rigorously by the reports of a surveyor, who is sent upon the premises for the very purpose of finding fault. Still there is only a certain latitude to be allowed in these cases; and the jury are to say whether or not the lessees

have, in the present instance, done what was reasonably to be expected of them, looking to the age of the premises, on the one hand, and to the words of the covenant which they have chosen to enter into, on the other.

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and ANOTHER.

The jury said, that, under all the circumstances, they thought the covenants had not been broken; and they found a

Verdict for the defendants.

Talfourd Serjt. and *Butt* for the plaintiffs.

Wilde Serjt., *Thesiger*, and *Hoggins* for the defendants.

A motion was afterwards made before the Lord Chancellor to set aside the verdict, on the ground that it was against the evidence; but no objection was made to the manner in which the Lord Chief Justice had left the case to the jury.

WESTMINSTER
Feb. 10.

VINE and Another v. MITCHELL.

INDEBITATUS ASSUMPSIT for goods sold and delivered.

Plea, general issue.

The plaintiffs were dealers in woollen cloths, and in and previously to the year 1831, had supplied the defendant, who was a tailor, with goods on credit; and in the month of *August* in that year the debt due from the defendant to the plaintiffs amounted to a sum exceeding 700*l*. The plaintiffs

When a creditor compounds with his debtor under a false impression, in which the debtor knowingly leaves him, as to the extent of the debtor's estate, the creditor is not estopped from suing for the balance of his debt.


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about that time pressing the defendant for a settlement of his account, his son expressed his inability to pay them, but proposed to them that they should take a composition of 10s. in the pound, upon the amount of their debt. After a day or two's consideration, the plaintiffs agreed to take the composition upon the terms following: — The defendant was to hand over to them a cheque for 130*l.* which he had just received from one of his customers, and which the plaintiffs were to apply in part payment of their account; and for the residue they agreed to take a composition of 10s. in the pound: 200*l.*, part of which, was to be secured by the acceptance of one Mrs. *Turner* (the defendant's mother-in-law), payable at twelve months, and the remainder of the composition by the defendant's own acceptance. The defendant accordingly handed over to the plaintiffs the customer's cheque for 130*l.*, together with Mrs. *Turner's* acceptance for the 200*l.*, and his own acceptance for the remainder of the debt, as agreed.

It did not appear that the defendant had at the time any other creditors than the plaintiffs. The plaintiffs had subsequently supplied the defendant with goods on credit, and had been paid for them. The present action was brought to recover the balance remaining unpaid on their original demand of 700*l.* odd.

There was no evidence of the defendant's having been expressly required by the plaintiffs to make a full disclosure of his property; neither was there any direct evidence that he professed to do so. All that appeared on that subject was, that the defendant's son, being called as a witness for the defendant, swore, on his cross-examination, that he

told the plaintiffs he thought his father would be able to pay 10s. in the pound, if they would accept it ; and that he shewed them a statement of the book debts due to and from his father ; that one of the plaintiffs expressing dissatisfaction at the offer, the defendant reminded him that he had rent and taxes to pay too ; to which the plaintiffs replied, that as to that, the stock and fixtures would satisfy the rent and taxes. It now, however, appeared, that at the time when the plaintiffs were induced to agree to the composition, the defendant was entitled, under his marriage-settlement, to a life interest of considerable value in some leasehold property, expectant on the death of Mrs. Turner ; and this circumstance was not communicated to the plaintiffs.

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Wilde Serjt., for the plaintiffs, insisted that under the circumstances stated, it was clear they had consented to accept the smaller sum, on the faith that the defendant had made to them a full disclosure of all his property ; that his suppression of the fact of his having a valuable interest in the leasehold property was a gross fraud upon them, which vitiated the contract of composition, and they were therefore still entitled to receive the balance remaining due upon their original debt. The case might be different if the composition had been entered into by a body of creditors : in that event there might be difficulty in relieving any one creditor, to the prejudice (it might be said) of the others. But here there was no evidence of there being any other creditors than the plaintiffs themselves.

Jones Serjt. There is no case which decides

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that, when a composition takes place, a debtor is bound to make a full and voluntary disclosure of his effects to his creditors. The defendant was never called on to make a disclosure of all his property ; and unless he was expressly required to do so by the creditor, he was not bound to give up property like this, which, under the circumstances, he had no moral right to appropriate to his own purposes.

TINDAL C. J. told the jury the question for them to decide was, whether the defendant had fraudulently suppressed the fact of his having the beneficial interest in the leasehold property ; and that depended upon the question, whether, at the time when the composition was entered into, the parties were dealing upon the understanding that the defendant had no other available property than his book debts ? If the question had been asked, and the defendant had said he had no other available property, that would have been clearly fraudulent ; and the circumstance of the question not having been, in terms, asked made no difference, if the jury thought, from all the circumstances, that such was the impression on the mind of the plaintiffs, and that the defendant purposely left them to act under that false impression. If the jury came to that conclusion, they would find a verdict for the plaintiffs : if, on the other hand, the jury thought that the plaintiffs had voluntarily consented to take into their consideration only the defendant's book debts, and not any other property he might have, when they were agreeing upon the terms of the composition ; and that they were not led to believe that the defendant had no other

available property, — then their verdict would be for the defendant.

Verdict for the plaintiffs.

Wilde Serjt. and *Thesiger* for the plaintiffs.

Jones Serjt. and *Hutchinson* for the defendant.

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SPRING ASSIZES, 4 W. IV.

NEWCASTLE.
Coram TAUNTON J.

SMITH and Others, Executors of ELIZABETH
HILL v. JOHN BATTENS.

Feb. 28.

THE declaration was upon a promissory note, dated *February* 1st, 1815, for 100*l.*, with interest, payable to *Elizabeth Hill* at a certain time after date.

Pleas, first, general issue; secondly, statute of limitations. Issue thereon.

The note, when produced, had several indorsements upon it, purporting to be receipts for payment of interest. They were unsigned; and the last bore date before the 1st of January 1829 (*a*), and within six years before the commencement of the action. A witness was called, who proved that, in *January* 1831, *Elizabeth Hill* placed the note in his hands, then having these indorsements upon it.

Indorsements on a promissory note, admitting the receipt of interest, are presumed to have been written at the time they bear date.

(*a*) See stat. 9 Geo. 4. c. 14. s. 8. (Lord Tenterden's Act.)

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Ingham, for the defendant, objected, that it should be shewn in whose hand-writing the indorsements were made, and also that they were made before the 1st of *January* 1829, inasmuch as by the statute 9 G. 4. c. 14. s. 3. such indorsements made after that day could not be received in evidence, for the purpose of taking the case out of the statute of limitations, if they were made by or on behalf of the plaintiffs or their testatrix.

W. H. Watson, contrd. In *Searle v. Lord Barington* (a), indorsements made on a bond by the obligee,—and in *Parr v. Crotchett* (Dom. Proc., May 6th, 1824), Starkie on Evid. Append. 2d ed. p. 1085., indorsements on a note in the hand-writing of the payee,—were held evidence of the payment. The delivery by *Elizabeth Hill* of the note with the indorsements upon it, was an assent by her to such indorsements, and was the same in principle as if she had herself written the indorsements. As to the time, the Court will presume that the indorsements were written when they bore date. In *Parr v. Crotchett* no extrinsic evidence was given as to the time when the indorsements were made.

TAUNTON J. I entertain some doubt as to the first point; but, upon the whole, I think that the delivery by Mrs. *Hill* of the note with the indorsements then upon it, is evidence that they were made by her authority: if so, it is the same

(a) *Strange, Rep.* 826.

thing as if those indorsements had been written by her own hand. As to the *time* I have no doubt: if the indorsements were not written at the time they purport to bear date, it lies on the defendant to prove it: in the absence of all evidence to the contrary, I shall assume that they were written at the time they bear date.

Verdict for the plaintiff.

W. H. Watson for the plaintiff.

Ingham for the defendant.

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Doe dem. POOLE and Another v.
ERRINGTON.

Feb. 28.

EJECTMENT.

The declaration alleged a joint demise by the two lessors of the plaintiff.

It appeared in evidence that the lessors of the plaintiff claimed the property in dispute as devisees under a will which devised it to them as tenants in common.

The defendant objected that the plaintiffs could not recover on a joint demise—whereupon *Coltman*, for the plaintiff, applied for leave to amend, either by striking out the name of one of the lessors of the plaintiff, or by adding proper words applicable to the title as it now appeared; and he submitted that the learned Judge had authority to direct the amendment, under the recent act 3 & 4 W. 4. c. 42. s. 23.

In ejectment on a joint demise by two, the plaintiff was not allowed to amend under stat. 3 & 4 W. 4. c. 42. s. 23., by substituting several demises.

TAUNTON J. thought the amendment was not one which he had authority to make: the amend-

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ment was prayed for in a particular very material to the merits of the case. He therefore refused to allow the amendment, and there was a

Nonsuit.

Coltman and Ingham for the plaintiff.

Cresswell, Alexander, and W. H. Watson for the defendant.

A Rule Nisi was obtained in the Court of K. B. to set aside the nonsuit, but it was afterwards discharged; and in the course of the argument, *Littledale J.* intimated that the Court *in Banco* could not control the discretion exercised by a judge at Nisi Prius in refusing amendments under the Stat. 3 & 4 W. 4 c. 42. See 3 Nev. & Man. 646.

IN THE COURT OF COMMON PLEAS AT
LANCASTER.

Coram ALDERSON J.

March 15.

BLACKLEDGE v. HARMAN.

Where an overseer has stopped part of a pauper's parochial weekly allowance, and engaged to pay it over to the landlord of the pauper, in pursuance of an understanding between the three; held, that the landlord could not support assumpsit for money had and received against the overseer.

DEBT for use and occupation, and money had and received, account stated, &c.

Plea, *nil debet*.

The facts of this case were as follows : —

In the year 1829, the plaintiff agreed to let a cottage to a person called *Dickenson*, who was then a pauper, receiving 4s. a week from the parish of *Wheelton*; and it was agreed between the plaintiff and *Dickenson*, that the defendant (who was the standing overseer of *Wheelton*) should pay the plaintiff 2s. a week towards the rent, out of the money allowed to *Dickenson* as parochial relief.

In pursuance of this agreement, the pauper went to the defendant and communicated to him the terms of the agreement: he approved of it, and his approval was made known by the pauper to the plaintiff.

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From that time until the present action was brought, the defendant had, in point of fact, made a deduction of 2s. from the weekly allowance of *Dickenson*.

In the year 1833, the defendant having never paid any thing to the plaintiff, and there being also a very considerable arrear due from the pauper in respect of the residue of the rent, several applications were made to the defendant by the plaintiff's attorney for payment. Upon one of these occasions the defendant admitted the agreement, and that he had got the money for the pauper; and he paid the plaintiff 10*l.* odd, and promised that he would pay the remainder upon the following *Saturday*, if the plaintiff would distrain upon the pauper's goods; and this the plaintiff had accordingly done; but a balance still remained due, for which the action was brought.

It was conceded by the plaintiff's counsel, that he could not recover as for use and occupation; and they consequently relied upon the money counts and account stated.

Cresswell, for the defendant, submitted that the plaintiff was not entitled to recover upon any of the counts.

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F. Pollock and Martin, contra. The defendant having, in fact, received the money from the parish on account of the pauper, and having expressly agreed to hold that money for the plaintiff, the latter is entitled to recover the amount as money had and received by the defendant to his use: they also submitted that there was sufficient evidence to entitle the plaintiff to a verdict on the account stated.

ALDERSON J. I am of opinion that an action for money had and received will not lie. It is true that, when applied to by the plaintiff's attorney, the defendant said he had got the money for the pauper, and would pay the plaintiff the balance, provided he, the plaintiff, would first distrain upon *Dickenson's* goods; but one must put a reasonable construction upon these words, with reference to the circumstances under which the defendant spoke them. The defendant was not, at any time, a debtor to the pauper; the money was not received by him expressly for this particular pauper, neither had the pauper at any period of time a legal right to it: when, therefore, the defendant said he had got the money for him, the meaning could only be, that, having parish money in his hands, he had omitted paying the weekly sum of 2s. to the pauper out of that money. That state of facts would not entitle *Dickenson* himself to support a count for money had and received to his use; and it is impossible, therefore, that such a count can be supported by the present plaintiff who claims under *Dickenson*. I shall direct the plaintiff to be called.

Nonsuit.

F. Pollock and *S. Martin* for the plaintiff.
Cresswell for the defendant.

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HARMAN.

Pollock applied for a rule to shew cause why the nonsuit should not be set aside, and a new trial had.

ALDERSON J. I entertain a very clear opinion that the action is not maintainable. I shall not, therefore, grant any rule *nisi*, unless, on conferring with my Brother *Taunton*, I find that he entertains a different view of the case.

On coming into Court the following morning, *Alderson J.* said he had spoken to Mr. *J. Taunton*, who entirely concurred in the opinion which he had expressed on this case: there would, therefore, be
No rule.

RISHTON v. NISBETT.

March 18.

WIGHTMAN moved, on behalf of a person in the sheriff's custody, that he might be discharged. He had been arrested on *mesne process* for debt, and the ground of his present application was, that at the time of the arrest he was privileged as a witness in the above cause.

A witness attending at the request of a party an arbitrator under a submission to be made a rule of court, is privileged from arrest.

Starkie shewed cause against the motion.

ALDERSON J. took time to consider the case, and consult *Taunton J.* upon it, and the following

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morning he delivered judgment to the following effect: —

This was an application by a party to be discharged from arrest, on the ground of his being privileged from arrest at the time. The facts were, that a suit was pending in this Court, and that the present applicant (being a person resident in *Ireland*) was requested by one of the parties to the suit to come over and give evidence on the trial, which was expected to take place at these assizes. Accordingly, though there was no compulsory mode of enforcing his attendance, he did come over to this country; but, on his arrival at *Liverpool*, he found that the cause had been referred to arbitration. The arbitrator appointed the meeting to take place before him at the distance of a week from the time of the witness's arrival at *Liverpool*. He accordingly waited there during that space of time, attended before the arbitrator and gave his evidence, and then set out on his return home; and on his return, and before he left this country, he was arrested by a creditor. There was no suggestion that the applicant had been guilty of unnecessarily delaying his return home after he had given evidence. Under these circumstances, he applied to this Court to be discharged out of custody, and cause was shewn against the application, on the ground that the party came forward and exposed himself to the risk of detention *voluntarily*, and not in obedience to any process; and, secondly, on the ground that, if he chose to remain in this country after he had found that the suit had been referred, and so

withdrawn from this Court, at all events he could not then be any longer entitled to its protection.

I have consulted my Brother *Taunton* on the subject, and we think there is one point upon which we ought to have further information. The affidavits state that the cause was referred to arbitration, but the terms of the agreement of reference do not appear: it does not appear whether the agreement contained the usual clause enabling the parties to make the agreement a rule of Court: if it did, we think the party is entitled to his discharge, and that we ought to make the order. If the agreement does not contain the clause I have mentioned, I apprehend we cannot interfere.

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Wightman, on a subsequent day, produced an affidavit, by which it appeared that the agreement did contain the clause in question; and thereupon *Alderson J.* made an order for the discharge of the applicant.

WESTERN CIRCUIT.—DORCHESTER.

Coram WILLIAMS B.

REX v. LOVELESS and Five Others.

DORCHESTER.
March 17.

THE prisoners were indicted under the first section of the 37 G. 3. c. 123.

An association, the members of which are bound by oath not to disclose

The first count of the indictment stated, that its secrets, is an unlawful combination and confederacy (unless expressly declared by some act of parliament to be legal), for whatever purpose or object it may be formed; and the administering of an oath not to reveal any thing done in such association, is an offence within the 37 G. 3. c. 123. s. 1.

The enacting part of the 37 G. 3. is not restrained by the preamble.

The precise form in which the oath is administered is not material; it is an oath within the meaning of the act, if it was understood, by the party tendering and by the party taking it, as having the force and obligation of an oath.

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the prisoners administered to one *Edward Legg* an oath or engagement, purporting and intended to bind him not to inform or give evidence against any associate or other person belonging to a certain unlawful combination and confederacy before that time formed and entered into by and between the prisoners and divers other persons.

The second count alleged, that the oath was administered by one of the prisoners, and that the others were aiding and assisting at, and were present at and consenting to, the administering of the oath.

The third count alleged, that the oath was administered by a person unknown, and that all the prisoners were aiding, &c. and consenting to it.

A second set of counts, framed in a similar manner, charged the purport of the oath to be, that the party taking it should be bound not to reveal or discover such an unlawful combination and confederacy as was stated in the first count.

In a third set of counts, the oath administered was alleged to be intended to bind the party not to reveal or discover any illegal oath or engagement which might have been administered to or taken by the party himself, or to or by any other person, or the import of any such illegal oath or engagement.

And in a fourth set of counts, the oath administered was charged as intending to bind the party to obey the orders and commands of a certain body of men not lawfully constituted.

The counsel for the prosecution, in opening the case to the jury, told them that he should principally rely on the second set of counts, in which

e matter charged as intended to be concealed is the very combination itself in which the prisoners were associated together. The question then would be, whether that association was an illegal one. If it was, any engagement, in the nature of an oath, intended to bind a person not to reveal it, was an offence within the meaning of the 37 G. 3. c. 123. Now the 39 G. 3. c. 79. s. 2. enacts, among other things, that every society the members whereof shall, according to the rules thereof, or to any provision or agreement for that purpose, be required or admitted to take any oath not required or authorized by law; and every society the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement, on becoming or in consequence of being members of such society, shall be deemed and taken to be unlawful combinations and confederacies; and every person coming a member of any such society shall be deemed guilty of an unlawful combination and confederacy. By sect. 8., this offence may be proceeded against either in a summary way before a justice of the peace, or by way of indictment as a misdemeanor. The 57 G. 3. c. 19. s. 25. enacts, that all societies or clubs, the members whereof shall be required or admitted to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement, on becoming, or in order to become, or in consequence of being, a member or members of such society or club, shall be deemed and taken to be unlawful combinations

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and confederacies within the meaning of the 39 G. 3. c. 79., and may be prosecuted, proceeded against, and punished, according to the provisions of the said act.

It was proved that *Edward Legg* was, with other persons, taken by two of the prisoners to a house in the village of *Tolpuddle*, belonging to a third prisoner, and that there by night, in the presence of all the prisoners, one of whom was dressed in a surplice, a form of words was addressed to them while kneeling down and their eyes bandaged. These words, which imported a dire imprecation on themselves if they revealed what they there saw or heard, they were desired to repeat, and did repeat, after the person pronouncing them; as to whom, evidence was given for the purpose of shewing that it was the same prisoner who wore the surplice. After repeating the words, *Legg* and the others were successively made to kiss a book, which, on their being unblinded, appeared to them like a small Bible, and they were then told that they were all brethren. The representation of a figure of death was exhibited to *Legg* and the others in the midst of the above ceremony, the bandage being for that purpose removed from their eyes; and one of the prisoners at the same time pronounced the words, "Remember thy end."

The association to which these persons were thus admitted, was proved to be framed for the purpose of raising wages by a general strike on the part of its members, and for other purposes in furtherance of that design.

The case for the prosecution being closed, *Butt* and *Derbshire* for the prisoners, objected that the facts adduced on the part of the prosecution did not constitute a legal offence within the meaning of the Stat. 37 G. 3. c. 123., on which the indictment had been framed. That act in the preamble recites, that “ divers wicked and evil-disposed persons have of late attempted to seduce persons serving in his Majesty’s forces by sea and land, and others of his Majesty’s subjects, from their duty and allegiance to his Majesty, and to incite them to acts of mutiny and sedition, and have endeavoured to give effect to their wicked and traitorous proceedings by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered.” The enacting part of the statute follows immediately upon the preamble; and the whole of it is consistent with the object of the preamble, namely, the protection of soldiers, sailors, and others of the king’s subjects from the arts of those evil-minded persons who might labour to seduce them from their allegiance. They contended, therefore, that the enacting part of this statute ought to be controlled by the preamble, and urged, that it would require very strong authority to shew that the offence, if any, here proved, was brought within the scope of its provisions. With regard to the case of *Rex v. Marks*, 3 East, 157., in which it was held that the administering of an oath, binding the party not to reveal a combination formed for the purpose of raising wages, was a case within this statute, which extended to other objects of a more general nature

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than simple mutiny and sedition, they observed that the conviction in that case came before the Court on an application to bail the prisoners, and that it could not be regarded as a formal decision on the point.

It was objected, secondly, on the part of the prisoners, that there was no proof of a specific oath having been administered; and, thirdly, that there was no evidence of any confederacy formed for any illegal purpose, the combination laws having been repealed, and associations for the purpose of raising wages having no longer a character of illegality impressed upon them. It was urged, that the society, of which the prisoners were members, might be one formed for the mutual protection of each other, a sort of friendly society, or local agricultural savings' banks. And it was said that, if this association were an illegal one, the same principle would apply to lodges of freemasons, in which oaths of secrecy are invariably taken. (*a*)

WILLIAMS B. declined hearing the counsel for the prosecution in answer to the above objections, and left it to the jury to say whether they were of opinion that the prisoners at the bar were members of a society, the secrets of which they were under an obligation not to reveal.

(*a*) Freemasons' lodges are, by the 39 G. 3. c. 79. s. 5., and the 57 G. 3. c. 19. s. 26., exempted from the operation of these acts, provided they comply with certain formalities prescribed by the 6th section of the former act.

With regard to the oath contemplated by the act of parliament, on which the prisoners were indicted, he stated that it was not required to be of a formal nature, but that it was sufficient if it was intended to operate as an oath, and was so understood by the party taking it. The precise form of the oath was not material; and the act itself provided against any evasion of its intentions by declaring, as it does, in sect. 5., “that any engagement or obligation whatsoever in the nature of an oath, shall be deemed an oath within the intent and meaning of this act, in whatever form or manner the same shall be administered or taken.”

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The learned Judge concluded by telling the jury that, if they found that such an obligation as was intended to operate as an oath, had been administered by the prisoners, and taken by *Legg*; if they were of opinion that the oath thus tendered and taken was meant to prohibit him from disclosing what he himself, or others, had done or might do in that society; and if they were also of opinion that the prisoners, as members of the society, had taken a similar oath of secrecy themselves, in that case they should pronounce a verdict of guilty, and accompany their verdict with a special finding as to the latter point.

The jury returned a verdict of guilty, and found specially, that at the time of administering the oath the prisoners themselves belonged to a secret society, having taken oaths not to disclose the secrets of that society.

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On the following morning the learned Judge stated, that having taken time to consider what weight was due to the objections taken by the prisoners' counsel, he had come to the conclusion that they did not amount in point of law to valid objections to the conviction which had taken place. (a)

The prisoners were transported.

Gambier and Barstow for the prosecution.

Butt and Derbyshire for the prisoners. (b)

(a) It might be inferred from the 7th section of the 37 G. 3. c. 123., which was not cited either on this occasion or in the case of *Rex v. Marks*, that the offences contemplated by this act were of a treasonable nature, and that, consequently, an offence like that charged in *Rex v. Marks*, and in the principal case, would not be within its provisions; but it does not appear to be conclusive on the point. It provides and declares, "that any
 " person who shall be tried and acquitted, or convicted of any
 " offence against this act, shall not be liable to be indicted,
 " prosecuted, or tried again for the same offence or fact as high
 " treason, or misprision of high treason, and that nothing in this
 " act contained shall be construed to extend to prevent any
 " person guilty of any offence against this act, and who shall
 " not be tried for the same as an offence against this act, from
 " being tried for the same as high treason, or misprision of high
 " treason, in such manner as if this act had not been made."

(b) This case is remarkable for the interest which it excited amongst the working classes in all parts of the country. Numerous petitions were presented to both Houses of Parliament, praying a remission of the sentence, and the subject underwent considerable discussion. On the 21st of April, persons calling themselves the Trades' Unions of the metropolis marched in procession, to the number of from 25,000 to 30,000 men, from Copenhagen Fields to Whitehall, through the streets of London, with a petition to his Majesty to the same effect, said to have been signed by 266,000 persons. Lord Melbourne (the Secre-

tary of State for the Home Department) declined receiving the petition so presented; and it was afterwards presented by a deputation. The sentence against the prisoners was, however, not remitted.

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TAUNTON.

Coram BOSANQUET J.

REX *v.* SPRIGGS and HANCOCK.

April 10.

INDICTMENT for breaking and entering a dwelling-house, and stealing therein.

The evidence shewed the entry to have been made either through the chimney or through a hole in the roof of the brewhouse, part of the dwelling-house, the doors and windows of which were fastened. The hole was left for the purpose of light. *Rex v. Brice*, Russ. & Ry. 450., was cited, to shew an entry by the chimney to be a breaking, and it was contended that an entry through an opening left as a window was the same.

An entry to a house through a hole in the roof left for the purpose of light, is not a sufficient breaking and entering to constitute house-breaking.

BOSANQUET J. The entry by the chimney stands upon a very different footing: it is a necessary opening in every house, which needs protection: but if a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking.

Guilty of larceny.

1834.

REX

v.

SPRIGGS and
HANCOCK.*Jardine* for the prosecution.

The prisoners were undefended.

MEMORANDUM.

IN the course of *Easter* term Mr. Baron *Vaughan*, Mr. Justice *Parke*, Mr. Justice *Alderson*, and Mr. Baron *Williams* resigned their respective seats as Judges of the Courts in which they had hitherto sat.

Mr. J. *Parke* and Mr. J. *Alderson* were immediately afterwards appointed Barons of the Court of Exchequer, Mr. B. *Vaughan* a Judge of the Court of Common Pleas, and Mr. B. *Williams* a Judge of the Court of King's Bench, and took their seats accordingly.

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ADJOURNED SITTINGS AT GUILDHALL.

EICKE, Gent. One, &c. v. NOKES.

1834.
GUILDHALL,
May 13.

ASSUMPSIT for work and labour as an attorney, for money lent, &c., and on an account stated.

Pleas, *non assumpsit*, and the statute of limitations.

Replication to the latter plea, a promise within six years.

The plaintiff gave in evidence the last examination of the defendant under a commission of bankrupt which had been issued against him, and which was afterwards superseded. In that last examination, stated to be taken pursuant to the statute, under the head of "Due by Bankrupt," was inserted the sum of 594*l.* 9*s.* 6*d.* as due to the plaintiff. The debt was proved to have arisen for business done by the plaintiff as attorney for the defendant. The examination was taken in the year 1828, and the debt was barred by the statute of limitations, unless the entry in the bankrupt's

An entry, in a bankrupt's examination, of a certain sum being due to A., is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. An attorney's bill cannot be recovered on an *account stated*, though the amount has been admitted, without proof of the delivery of his bill

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examination took the case out of the statute. There was some evidence of a signed bill of costs having been delivered by the plaintiff a month before action brought ; but it was questionable whether it had been delivered at the dwelling-house of the defendant, as required by the statute 2 Geo. 2. c. 23., and the plaintiff consequently relied upon the entry in the last examination as entitling him to a verdict on the *account stated*.

Wilde Serjt., for the defendant, contended, first, that the entry made by the bankrupt was not evidence of an account stated between the plaintiff and defendant ; and for this he cited *Tucker v. Barrow* (a), in which case *Littledale* J. said that he was disposed to think that an admission, obtained under a compulsory examination, was not evidence of an account stated. He also contended, on the authority of *Brigstocke v. Smith* (b) and *Kennett v. Milbank* (c), that the entry, although purporting to be an acknowledgment of a debt, did not express any promise to pay, and was made under circumstances from which no such promise could be implied ; and therefore was not sufficient to take the case out of the statute of limitations ; and in support of this position he cited what was said by Lord *Tenterden* C. J. in *Tanner v. Smart* (d). Secondly, even supposing that there is evidence of an account stated, still, as it appeared that the subject matter of the account was an attorney's bill of costs, the plaintiff cannot maintain the action without proving a due delivery of that bill, pursuant to the statute.

(a) 7 B. & C. 623.

(c) 8 Bing. 38.

(b) 1 C. & M. 483.

(d) 6 B. & C. 603.

Curwood, contra, maintained that the clause of the statute of 2 Geo. 2., requiring a delivery of the attorney's bill, only applied where actions were brought on the bill. Here the plaintiff sued on an entirely new and distinct consideration, viz. the count stated.

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TINDAL C. J., on the first point, held, that the entry in the bankrupt's last examination was evidence of an account stated, as amounting to an absolute admission of a subsisting debt; and that, for this reason, the case was distinguishable from *Mucker v. Barrow*. (a) He was also of opinion that the acknowledgment made by this entry was one which took the case out of the statute of limitations: it was an admission of a debt, in the first instance, to be paid under the bankrupt laws; and if not in that way, then according to the ordinary course of law; the cases cited were only cases of qualified admission. He should, therefore, hold that the entry was sufficient to take the case out of the statute; giving the defendant leave to move upon it. Upon the other point, he was of opinion that as the real cause of action, the subject of the admission, was the amount of an attorney's bill of costs, the plaintiff could not recover without proof of having duly delivered his bill. The jury would therefore say, whether the bill had been left at the defendant's dwelling-house; and if it had not, would find a verdict for the defendant.

Verdict for the defendant.

(a) See *Knowles v. Michel*, 13 East, 249., and *Highmore v. Dimrose*, 5 M. & S. 65.

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Curwood and *Paine* for the plaintiff.*Wilde* and *Atcherley* Serjts. and *Martin* for the defendant.

In *Trinity* term following, *Curwood* moved for a rule to shew cause why the verdict should not be set aside, and a new trial had ; first, on the ground that the distinct admission by the defendant of the amount due from him to the plaintiff for costs, superseded the necessity of proving a delivery of the bill under the statute ; secondly, that the verdict was against the evidence as to the due delivery of the bill. On the first point, he submitted, that if the client has expressed himself satisfied with the charges, the attorney is not bound to deliver a bill of them : there was here an admission of the amount, which entitles the plaintiff to a verdict. Supposing the client had accepted a bill of exchange for the amount of the costs, could he defend an action upon that acceptance, on the ground that it was given for the amount of law-costs, a bill of which had not been duly delivered ?

The Court granted a rule to shew cause why, upon payment of costs, the verdict should not be set aside, on the ground that it was against evidence ; but, on the other ground, they were of opinion that the ruling of the Lord Chief Justice was correct. The protection intended to be given to clients under the statute would otherwise be perpetually evaded by loose evidence of admissions. On the first ground, therefore, *Curwood* took nothing by his motion.

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KING'S BENCH.
SITTINGS IN AND AFTER TRINITY TERM.

BISHOP v. POLHILL and DEACON.

May 26.

DEBT on bond for 400*l*.

Plea, by the defendant *Deacon*, a discharge under the insolvent debtors act (7 G. 4. c. 57.).

To support this plea, the defendant's discharge, dated subsequently to the bond, was put in, by which the Court adjudged and ordered, "that the said prisoner shall be discharged from custody, and entitled to the benefit of the said act forthwith, as to the several debts or sums of money due, or claimed to be due, at the time of filing his said petition, from the said prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively," &c.

The schedule of the insolvent contained the plaintiff's name as creditor for 205*l*. for goods. It was suggested that the bond had been given as a security for the debt named in the schedule, but there was no proof of this.

Moody, for the defendants, contended that the insolvent debtors act, 7 G. 4. c. 57., discharged the insolvent, not only from the debts mentioned in the schedule, but from all debts due to or claimed to be due by the creditors named in

Semble: The discharge of an insolvent under 7 G. 4. c. 57. applies only to the debts named in the schedule, and not to all the debts due to the creditors named.

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v.

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as payment, until it has been presented and refused; and even if payment of it be refused, the refusal must be proved to have taken place before action brought. Here, there is no evidence of any refusal.

Verdict for the plaintiff for the amount of the bill of exchange only.

J. L. Adolphus for the plaintiff.

The action was undefended.

WESTMINSTER,
May 28.

WHITTAKER v. EDMUNDS.

In an action by an indorsee against the acceptor of a bill of exchange, the mere absence of consideration for the acceptance, and prior indorsements, does not throw the onus on the plaintiff of proving the consideration for the indorsement to him, where no circumstances of fraud or illegality appear.

THIS was an action by the third indorsee, against the acceptor of a bill of exchange. The bill was drawn upon the defendant by one *Rowley*, payable to his own order; by him it was indorsed to *Cookson*, who indorsed it to *Shiels*, who indorsed it to the plaintiff.

Hoggins, for the defendant, contended that there was upon the case, as proved by the plaintiff himself, sufficient evidence to shew that no consideration had passed between *Rowley*, the drawer, and the defendant. He proposed to prove that there was also an absence of consideration between *Rowley* and the first indorsee, and between the first indorsee and the second; and he urged, that this would throw upon the plaintiff, who sued as third indorsee, the burthen of shewing what consideration, if any, there had been for the indorsement


between the second indorsee, and him, the plaintiff; and he cited *Heath v. Sansom and Another*. (a)

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PATTESON J. I am of opinion that the evidence proposed to be offered by the defendant, will not make it necessary for the plaintiff to prove the consideration which he gave for the bill. Since the decision of *Heath v. Sansom*, the consideration of the Judges has been a good deal called to the subject; and the prevalent opinion amongst them is, that the Courts have of late gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can shew that there has been something of fraud in the previous steps of the transfer of the instrument; that throws upon the plaintiff the necessity of shewing under what circumstances he became possessed of it. So far I accede to the case of *Heath v. Sansom*; for there were in that case circumstances raising a suspicion of fraud: but if I added, on that occasion, that even independently of these circumstances of suspicion, the holder would have been bound to shew the consideration which he gave for the bill, merely because there was an absence of consideration as between the previous parties to the bill; I am now decidedly of opinion that such a doctrine was incorrect.

The defendant attempted to carry his case further, by shewing an absence of consideration as between the plaintiff and *Shiels* (the third indorser), as

(a) 2 B. & Adol. 291.

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well as between the previous parties ; but he failed in making it appear satisfactorily that even the acceptance was without consideration; and thereupon,

PATTESON J. ruled that the plaintiff was clearly entitled to recover ; the very first link failing in the chain of proof which it was necessary for the defendant to establish.

Verdict for the plaintiff. (a)

Miller for the plaintiff.

Hoggins for the defendant.

(a) See *Jacob v. Hungate, infra* (sittings after Michaelmas Term, 1834).

SITTINGS AFTER TRINITY TERM.

GUILDHALL,
 July 3.

HAWES and Another v. FORSTER and
 Another.

In an action by the vendee against the vendor on a contract made through a broker, it is sufficient for the vendee to produce the bought-note handed to him by the broker,

ASSUMPSIT to recover the sum of 320*l.*, being the amount of damages sustained by the plaintiff, by the non-delivery of oil on the 30th of *June* 1831, pursuant to contract.

Plea, general issue.

This was the second trial of the action. On the first trial (which took place before Ld. C. J. *Denman* and a special jury, at the *London* sittings

and to shew the employment of the latter by the vendor. If the sold-note vary from the bought-note, it lies on the vendor to prove that variance by producing the sold-note.

When a contract is made through a broker, the bought and sold notes delivered to the parties constitute the contract ; not the entry made by the broker in his book. Especially when, by the usage of trade, the bought and sold notes are looked upon as the contract.

after *Michaelmas* term 1832), it appeared that the oil had been bought by the plaintiffs of the defendants, through Mr. *Wright*, one of the sworn brokers of the city of *London*. The plaintiffs, on that occasion, put in the bought-note, which was in the following terms : —

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“Bought for Messrs. *B. T. and W. Hawes*, of Messrs. *Forster and Smith*, from 80 to 100 tons of palm oil, of merchantable quality, free from dirt and water, at 26*l.* per ton, payable per cash,” &c.
 “The above oil warranted to arrive on or before the 30th of *June* (current), ex Premier, Fullerton, *Cape Coast*. Customary allowances.

“*London*, 27th of *May* 1831.

“*Thomas Wright*, Broker.”

And Mr. *Wright*, being called by the plaintiffs, and having proved his being employed by the defendants to sell the oil, said, that he made and signed an entry of the contract in his broker's book ; that the bought-note was written by his clerk, and signed by himself ; that the entry was made, and the bought and sold notes written and sent to the respective parties, on the same evening, but whether the entry or the notes were first written he could not say.

The plaintiffs proved, that on the day mentioned in the bought-note (30th of *June*), they required the defendants to deliver the oil ; and that default being made, they had bought other oil at an advanced price. The sold-note was not called for by the plaintiffs on the trial ; whereupon

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Campbell S.-G., for the defendants, submitted that the plaintiffs must be nonsuited. It was the universal usage to produce both the bought-note and the sold-note; and there was no evidence of a binding contract between the parties, without producing the two instruments, and shewing their correspondence with each other.

Sir *J. Scarlett* for the plaintiff. The bought-note, which has been produced by the plaintiffs, is evidence of a contract signed by Mr. *Wright*, who is proved to be the agent of the party charged therewith. It is not necessary for the plaintiffs to go further.

DENMAN Ld. C. J. was of opinion, that the plaintiffs were not called upon to give any evidence of the sold-note delivered by the broker to the defendants.


Campbell S.-G., then offered to produce the broker's book, according to which (as he suggested), the defendants were not to be bound by the contract, unless the ship, mentioned in the bought-note, should arrive by the 30th of *June*. And he contended, that the entry in the broker's book formed the original contract; the bought and sold notes being, in fact, only minutes of the contract furnished by the broker to the two parties. And he cited *Heyman v. Neale* (a), *Grant v. Fletcher* (b), *Groom v. Aflalo*. (c)

(a) 2 Campb. 337.

(b) 5 B. & C. 436.

(c) 6 B. & C. 117.

Sir *J. Scarlett*, *contra*, relied upon the case of *Thornton v. Meux* (a) as the last authority upon the subject, distinctly shewing, that the entry in the broker's book is not admissible in evidence to contradict the bought-note.

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DENMAN Ld. C. J. I am of opinion, that the plaintiffs have proved a contract, by producing the bought-note signed by Mr. *Wright*, and shewing that person to have been the agent engaged by the defendants to dispose of the oil. It is not shewn, that the sold-note delivered to the defendants differed from the bought-note delivered to the plaintiffs: had that been shewn to be the case, it would have been very material; but, in the absence of all proof of that nature, I am clearly of opinion, that I must look to the bought-note, and to that alone, as the evidence of the terms of the contract; the defendants shall, however, have leave to move for a nonsuit.

The evidence was rejected; and, under the direction of his Lordship, the jury returned a
 Verdict for the plaintiffs.

In *Hilary* term following, *Campbell* S.-G. obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, on the ground of the non-production of the sold-note; or else, why a new trial should not be granted, on the ground that the entry in the broker's book formed the contract, and that such book ought, therefore,

(a) M. & M. 43.

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to have been received as evidence for the defendants on the trial.

The rule as to the nonsuit was discharged ; but the rule for a new trial was, after argument, and time taken by the Court for consideration, made absolute ; the Lord Chief Justice saying, that the Court doubted whether the case involved any point of law at all, — and whether it did not rather turn upon the custom, viz. how the broker's book was treated by those who dealt with him. Looking to the importance of the question, the Court thought it fit to let it undergo further consideration, in order that evidence might be given as to the usage of trade in the city : and his Lordship added, that if it were deemed matter of law, it would be better to tender a bill of exceptions ; if matter of fact, to let the opinion of the Jury be taken upon it.

The case accordingly now came down for a second trial ; and on this occasion, the plaintiffs (after putting in the bought-note, and examining the broker to the same effect as on the former trial) called upon the defendants, after due notice, to produce the sold-note : it was accordingly produced, and corresponded with the bought-note already set forth. The plaintiffs then called several of the most eminent merchants in the city, all of whom concurred in declaring, that they had never known any instance where the broker's book had been referred to, and that they always looked to the bought and sold notes as the contract ; and some of them added, that if the broker's bought or sold note (as the case might be) were not consonant with their directions to the broker, they returned it.

For the defence, the broker's book was produced, and the entry respecting the transaction in question was, without opposition, read. It agreed with the bought and sold notes, excepting that, instead of the words, "the above oil warranted to arrive on or before the 30th of *June*, ex Premier, Fullerton, *Cape Coast*," the words in the broker's book were, "if the above do not arrive on or before the 30th of *June*, this contract to be void." The defendants did not call witnesses to rebut the evidence given by the plaintiffs as to the usage; but they produced a copy of the regulations made in the year 1818, by the Court of Aldermen, for the conduct of sworn brokers, and which regulations were proved to have been generally circulated. (a)

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Lord DENMAN C. J. in summing up the case, said to the Jury: — The only question before you,

(a) According to these regulations, the broker is directed to enter all contracts on the day of the making thereof, &c., and deliver a contract note to both buyer and seller, or either of them, within twenty-four hours after request, containing therein a true copy of such entry; and shall, upon demand being made by buyer or seller, shew such entry to them, to manifest and prove the truth and certainty of such contract. — The bond executed by brokers has, since these regulations, been conditioned for their making their entries, &c. in the manner pointed out in the regulations: before the making of these regulations, the broker was only required to enter the contract in his book within three days after it was made.

These regulations were made in consequence of the report of a committee of the corporation of *London*, appointed on the 7th of *March* 1815, to enquire into the practice and general conduct of the brokers of the city. The report of the committee will be found to embrace the whole history of the brokers of

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is, whether the bought and sold notes constituted the contract ; or whether the entry in the broker's book, which in this case differed from the bought and sold notes, constituted it. I have, on a former occasion, expressed my own opinion to be, that in point of law, the note delivered by the broker to the party is the real contract ; that is still my opinion : but it has been thought better that the point should be submitted to you simply as a matter of fact ; that you may say which, according to the usage of trade in this city, has been the binding contract,—the broker's book, or the bought and sold notes ? If the evidence has satisfied you, that, according to the usage of trade, the bought and sold notes are the contract (and the evidence adduced before you, to shew that they are so considered, has not been met by any contradictory evidence from the other side), then you will find your verdict for the plaintiffs.

Verdict for the plaintiffs.

Campbell A.-G. applied for leave to tender hereafter a bill of exceptions to the direction of the Lord Chief Justice to the Jury, that they were to find for the plaintiffs, if they thought that, according to the usage, the bought and sold notes constituted the contract. Such leave was accordingly given ; but the defendants have since submitted to the verdict, and paid the damages and costs.

Sir *J. Scarlett*, *D. Pollock*, and *R. Gurney*, for the plaintiffs.

Campbell A.-G. and *Blackburne* for the defendants.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN THE EXCHEQUER,

AT THE SITTINGS AFTER
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5 W. IV. 1834.

SITTINGS AFTER TERM.

FLETCHER v. SAUNDERS.

1834.

WESTMINSTER,
June 27.

CASE for distraining for more rent than was due, with counts for not duly appraising according to the statute, &c.

The goods distrained were sold for 6s. 6d., the rent distrained for was 2l. 7s. 6d. The goods were proved to have been appraised by only one sworn appraiser.

An appraise-
ment by one
sworn broker
is sufficient in
distresses for
rent under 20l.

Thesiger for the defendant. Under the charges specified, in the schedule given by 57 G. 3. c. 93. for regulating the costs of distresses under 20l. is the charge —

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“Appraisement, whether by one broker or more, sixpence in the pound, on the value of the goods.” He contended that these words clearly imply that only one broker is necessary, and said that Mr. Baron *Parke* had so decided in cases of distress under 20*l.*

Lord LYNDHURST C. B. after looking at the statute, said, I think clearly, that, under this act, one sworn broker is enough.

Nonsuit. (*a*)

Bompas Serjt. and *Mansel* for the plaintiff.

Thesiger and *Ball* for the defendant.

(*a*) The stat. 2 *W. & M.* Sess. 1. c. 5. s. 2., enacts that “the person distraining shall cause the goods and chattels distrained to be appraised by two sworn appraisers;” and then authorises the sale of the goods and chattels “for satisfaction of the rent and charges of the distress, appraisement, and sale.” It is clear, therefore, that the statute intended the landlord to be reimbursed all the expenses of the appraisement. The first section of the stat. 57 *G. 3.* prohibits the landlord from making any other charges than such as are specified in the schedule; and as this schedule contemplates and apparently sanctions the employment of one broker only, and allows no charge for a second, it would seem to be a fair inference that the direction of the former act as to the employment of two brokers is virtually repealed by the stat. 57 *G. 3.* in cases within the last-mentioned act.

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WILKINSON v. TERRY and Another.

GUILDHALL,
July 4.

ACTION on the case. The first count was for distraining for more rent than was due ; that is, for the sum of 6*l.* 16*s.* 6*d.*, when, in fact, only 5*l.* 1*s.* 6*d.* was in arrear.

Second count, for not selling for the best price ; and the other usual counts were added.

For the plaintiff it was proved, that the notice of distress stated that it was made for 6*l.* 16*s.* 6*d.* of arrears of rent, viz. for thirty-nine weeks rent at 6*s.* 6*d.* a week, whereas it was proved that the rent then in arrear was only 5*l.* 1*s.* 6*d.* The goods had been sold for a sum between 5*l.* and 6*l.*, being not more than sufficient to pay the 5*l.* 1*s.* 6*d.* and the regular expenses of the distress. Evidence was also given that the goods had not been sold for the best price that could be obtained. Upon this,

Semble: that an action on the case does not lie against a landlord for distraining for more than the actual arrears of rent, unless the distress taken be of larger value than will satisfy the actual arrears.

Thesiger and *Platt*, for different defendants, contended, that as the goods had only produced enough to pay the arrears actually due, the first count could not be supported. A tenant is not injured by the landlord's alleging, in his notice, that he distrains for a sum beyond what is in arrear, unless more goods be seized than are sufficient to satisfy the actual arrears.

It is quite clear that a landlord is in no degree bound by the terms in which his notice of distress may be drawn up ; *per Lord Kenyon*, in *Crowther v. Ramsbottom*, 7 T. R. 658. : if the tenant had

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tendered the amount of the rent really due, and the landlord had still refused to give the goods up, the case would have been different.

Bompas Serjt., on the other hand, contended that the plaintiff was entitled to damages on the first count. A tenant must be very seriously prejudiced by his goods being taken from him, under pretence of distress for large arrears of rent, which, in fact, are not due: the excess in the claim has an immediate tendency to injure the credit of the tenant and to prevent him from raising the money required to satisfy the real arrears.

PARKE B., in summing up the case to the jury, expressed considerable doubt whether the facts stated in the first count presented any good cause of action. It was impossible that the tenant could have sustained any damage, from the mere circumstance of his landlord's having, at the time of the distress, made a claim for more rent than was really due: the substantial question was, whether the landlord had deprived the tenant of more of his goods than the real amount of his debt authorised. Still the facts stated in the first count had certainly been proved, viz. that the distress was for 6*l.* 16*s.* 6*d.*, whereas only 5*l.* 1*s.* 6*d.* was due: at present, therefore, the plaintiff was entitled to a verdict on that count, with nominal damages; and the validity of the count must be left to be disposed of hereafter.

Verdict for the plaintiff, 1*s.* on the first count, 10*l.* on the second.

Bompas Serjt. and *Steer* for the plaintiff.

Thesiger and *Platt* for the defendants.

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BATLEY and Another v. CATTERALL and
HINDE.GUILDHALL,
July 10.

ASSUMPSIT by drawers against acceptors of a bill of exchange.

The defendant *Hinde* suffered judgment by default. The defendant *Catterall* pleaded, that the defendants accepted the bill for the accommodation of the plaintiffs, and for their use and benefit, and without any consideration passing from the plaintiffs to the defendants for the acceptance of the same, or any part thereof.

Replication, That the said bill of exchange was accepted for a good, valuable, and sufficient consideration, and not for the accommodation of the plaintiffs, or without consideration, *modo et formâ*, &c.

Issue thereon.

No one appearing on the trial for the defendant,

F. Robinson, for the plaintiffs, submitted that he was entitled to a verdict on the first count, without calling any evidence. It is true, the affirmative, in point of form, lies upon the plaintiffs, to shew a consideration for the acceptance: but an acceptance, in itself, *primâ facie* imports that it was given for *some* consideration; and the plaintiffs have not here, by their form of replication, tied themselves down to the proof of any particular sort of consideration.

Where the acceptor of a bill of exchange pleads that it was accepted without any consideration, and the plaintiff replies, that it was accepted for a good consideration, the onus of proof lies on the defendant to shew the want of consideration. *Secus*, where the plaintiff in his replication specifies the particular sort of consideration for which he alleges the bill was accepted.

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ALDERSON B. I think that is correct. When a plaintiff alleges, in his replication, that the bill was drawn for some particular kind of consideration, he must prove his allegation; and I so ruled the other day, where the plaintiff had replied that the bill was accepted for the price of goods sold. But here the replication alleges no more than the bill itself imports.

Verdict for the plaintiffs. (a)

F. Robinson for the plaintiffs.

The case was undefended.

(a) The rules published by the courts in *Hilary Term 4 W. 4.* rendering it necessary for a defendant to plead the want of consideration, if that be the defence relied upon, a question has, in several cases, arisen respecting the party upon whom the *onus probandi* lies, when issue is joined on that defence. The principal case decides that where the plaintiff alleges in his replication merely that there was good consideration for the acceptance, not limiting himself to any specific kind of consideration, the *onus probandi* lies on the defendant. It is true, that on one occasion Mr. J. *Littledale* came to a different conclusion: that was the case of *Morgan v. Cresswell*, tried before his Lordship at *Guildhall*, at the sittings in *Michaelmas Term* 1834. The action was by the indorsee against the acceptor of a bill of exchange: plea, that there was no consideration between the drawer and the defendant (the acceptor), or between the drawer and the plaintiff (his immediate indorsee). Replication, that there was good consideration between the drawer and the plaintiff. The action was undefended; and *S. Martin* for the plaintiff having no evidence of consideration, and contending that he was not called upon to produce any, inasmuch as the indorsement itself imported a consideration, *Littledale* J. ruled that the plaintiff was bound to support his issue; and for want of evidence as to the consideration, his Lordship nonsuited the plaintiff. *Martin*, however, the next day obtained a rule to show cause why the nonsuit should not be set aside, and that rule was made absolute in *Hilary Term*, 1835, no cause being shown against it. On

the other hand, if the plaintiff chooses to allege the sort of consideration on which he relies, concluding with a verification, so that the defendant has an opportunity of traversing, and does in fact traverse, that allegation :—it would appear that in such a case the plaintiff brings upon himself the burthen of proving that the bill was given for the precise kind of consideration which he has specified in his replication. Mr. B. *Alderson* so ruled on the occasion to which he alluded in the principal case.

A third case may arise, viz. where the plaintiff alleges in his replication, that the bill was given for a good consideration, and then goes on to allege what that consideration was, but alleges it in such terms as will not tie him down to the precise proof of his allegation. The case of *Low v. Burrowes* (tried before Lord *Denman* C. J. at the *London* sittings, after *Michaelmas* Term 1834), was of this description. It was an action of *assumpsit* against the acceptor of a bill of exchange. Plea, that the defendant received no consideration for his acceptance. Replication, that defendant did receive consideration for the said acceptance, *to wit, two cows sold and delivered by the said plaintiff to the said defendant; and this he prays may be enquired of by the country.* *Platt*, for the plaintiff, having put in the bill, rested his case there; whereupon *Ball*, for the defendant, submitted that the form of the replication made it necessary for the plaintiff to give evidence of the consideration. He said that Mr. Baron *Alderson* had recently held, that where a plaintiff, instead of simply traversing the plea of no consideration, chooses to go further and allege precisely what the consideration was, he must give evidence of that consideration. Here the plaintiff had stated that the consideration was two cows sold and delivered, he must therefore prove it. *Platt contra*, said that the new rules of pleading were not intended to alter the rules of evidence, or to throw any burthen of proof on the plaintiff to which he was not before subject. It is quite clear that before the new rules, the holder of a bill could not thus be called upon to prove the consideration; and as to the form of the traverse, the consideration was here alleged under a *videlicet*, and the plaintiff was not therefore bound to prove it precisely as stated. Lord *Denman* C. J. ruled that the plaintiff was not bound by the form of his replication to prove what consideration he gave for the acceptance; the bill itself imported a consideration, and it was to be assumed that good consideration was given for it, unless the defendant could show the contrary. The plaintiff accordingly had a verdict.—And when *Ball* in *Hilary* Term

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following, moved to set the verdict aside, on the ground that the Ld. C. J.'s ruling was incorrect, the Court (Ld. *Denman* C. J. *Littledale* J. and *Williams* J.), after time taken to consider, refused the rule: the Ld. C. J. saying that the replication was in effect merely a traverse of the plea of no consideration; and though the plaintiff had gone on and alleged under a *videlicet* what the consideration was, he concluded his replication *to the country*, and not with a verification, thereby showing that the words under the *videlicet* were introduced merely as parcel of the traverse, and not as new matter upon which issue was to be taken; and, in fact, the defendant here, by the form of the pleading, had no opportunity of taking issue upon it.

The foregoing decisions seem clearly to establish, that if the plaintiff adopts the general form of traverse used in the principal case, he cannot be called upon, in the first instance, to give evidence of the consideration, the *onus probandi* lying on the defendant; and the plaintiff does not expose himself to any risk by adopting this general form of traverse in his replication, the Court of Common Pleas having, in *Hilary* Term 1835, decided that such a replication is good, even on special demurrer (*Prescott v. Levy*).

SUMMER ASSIZES, 5 W. IV.

WINCHESTER.

Coram PATTESON J.

WINCHESTER,

PAYNE v. SHEDDEN.

A plea of twenty years user of a right of way, under 2 & 3 W. 4. c. 71. is not defeated by proof of an agreed alteration of the line of way, nor by a temporary non-user under an agreement of the parties.

TRESPASS *quære clausum fregit*. Plea, justification under a right of way, that the defendant and other the occupiers of a certain messuage had for twenty years enjoyed, without interruption, an occupation

under a right of way, that the defendant and other the occupiers of a certain messuage had for twenty years enjoyed, without interruption, an occupation

way, as of right, over the *locus in quo*; that is to say, from *A.* to *B.* (*a*) Replication, denying enjoyment as of right for twenty years, &c.

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It appeared that although the occupiers of the messuage had enjoyed a way over the *locus in quo* during the last twenty years, yet that the line and direction of the way had been a good deal varied, and at certain periods wholly suspended, by agreement between the parties.

It was objected that evidence of the user of the way with such variations and suspensions of the enjoyment of it did not support the plea.

PATTESON J. If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under the statute; for the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with, the right. So, if, instead of the direct path from *A.* to *B.*, another track over the plaintiff's land from *A.* to *C.*, and thence to *B.*, had been substituted by a parol agreement of the parties for an indefinite time, yet the user of this substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it.

The defendant failed to establish any right at all, and the jury found a

Verdict for the plaintiff.

(*a*) See stat. 2 & 3 W. 4. c. 71. s. 2. & 5.

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Erle, Jeremy, and Follett for the plaintiff.*P. Williams, Coleridge Serjt., and Dampier* for the defendant.

SARUM.

Coram PATTESON J.

SALISBURY,
July 17.

REX v. WOOLFORD and LEWIS.

In an indictment for receiving stolen goods knowing them to have been stolen by a person named: the stealing by that person must be proved, or the receiver must be acquitted.

THE prisoner *Woolford* was indicted for stealing a gelding, and *Lewis* for receiving it knowing it to have been “*so feloniously stolen as aforesaid.*”

Woolford was acquitted, — and as the proof failed against him, although the horse had been stolen by some one, *Patteson J.* held, that *Lewis*, the other prisoner, could not be convicted upon this indictment, which charged him with receiving the gelding “*so feloniously stolen as aforesaid.*”

Another indictment was therefore preferred against *Lewis*, charging him with having received the gelding knowing it to have been stolen by “some person unknown.” When the prisoner was arraigned on this indictment, *Jeremy*, for the prisoner, objected that he had been tried upon the former indictment. The learned Judge over-ruled the objection, as the charge was different, and might be supported by different evidence; but said, that if a conviction should take place, and he should afterwards find that his previous direction to the jury was wrong, he should take care that the


prisoner should have the same benefit as if he had pleaded *autrefois acquit*.

The prisoner was acquitted.

Bingham for the prosecution.

Saunders for *Woolford*.

Jeremy for *Lewis*.

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DORCHESTER.

Coram Ld. DENMAN C. J.

Doe dem. BULLER v. MILLS.

DORCHESTER,
 July 21.

THIS ejectment was brought to recover possession of a strip of waste, on which a cottage had been built, and the occupier, *Nehemiah Williams*, had paid rent for some years to the lessor of the plaintiff, whose title for twelve years was clearly made out. The defendant claimed the ground as belonging to the adjoining close, and had recently given *Williams* 20*l.* to give up possession to him.

Where a person claiming title to lands obtains possession from a tenant, he is bound by the tenant's estoppel, and cannot, in an ejectment, set up a valid title against the landlord.

After the plaintiff's case was finished, a case as against the lessor of the plaintiff was opened by the counsel for the defendant, when *Wilde* Serjt. objected, that the defendant was estopped; he came in under *Williams*, and as the latter could not dispute the plaintiff's title, no more could the defendant, and he cited *Doe d. Knight v. Smith*, 4 M. & S. 347.

Erle *contra*. This is not the case of a tenant giving up possession to a mere stranger: the defendant offers to shew that he has a complete title to the land.

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Lord DENMAN C. J. The question is, whether this is a case of a tenant disputing his landlord's title? and I think it is. The defendant is in under the tenant, and it is of great importance to preserve the rule. With regard to what is said as to giving up to the right owner, if that were allowed, there would be an easy mode of enabling a party to defeat his landlord, by getting a third person to assume the possession.

Verdict for the plaintiff.

Wilde Serjt., Follett, and Fitzherbert for the plaintiff.

Erle and Gambier for the defendant.

DORCHESTER,
July 22.

DOE dem. WOLLASTON and Others v.
BARNES.

In ejectment by lessors claiming under several descents from a particular ancestor, when the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin.

The registry of a marriage is evidence between strangers of the time of the marriage.

THIS was an ejectment brought to recover property which descended from *John Clavell*, who died in *June* 1833. After his death, *Sophia Richards*, his sister and heiress-at-law, took possession of the property, and had since died, leaving a will devising her real property. There were demises in the declaration from the heir-at-law of *Sophia Richards* and *John Clavell*, and also from the devisees of *Sophia Richards*. The defendant claimed under a will of *John Clavell*.

Sir *James Scarlett*, for the defendant, claimed the right to begin, and said he admitted that *John*

Clavell died seised, that *Sophia Richards* was his heiress and had possession of the property from the time of his death, that the plaintiff was heir-at-law of *John Clavell* and of *Sophia Richards*, and that the plaintiff was entitled to the property unless he proved the will of *John Clavell*.

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He argued that the proper mode of trying the right was by considering the case as it would be supposing the parties had deduced their titles in the pleadings: in that case, the averment by the defendant in answer to the plaintiff's title would have been that *John Clavell* had made the will in question, and the plaintiff must have traversed that. Upon which, the affirmative of the issue would have been on the plaintiff, as it is here in fact; the only question being, did *Clavell* make the will, or did he not.

Wilde Serjt. said, that the defendant was bound to admit the whole of the plaintiffs' case, *Doe dem. Tucker v. Tucker*, M. & M. 536. Here it was part of the plaintiffs' case that *Sophia Richards* died seised, which would not be if *John Clavell* had made the will in question. The defendant might meet the plaintiff's case by some subsequent fact defeating that case, but he must admit all that the plaintiff was bound to prove to make out his case. The plaintiff is not bound to take admissions, except in the single case of the heir-at-law of the person last seised.

LORD DENMAN C. J. It is the duty of a Judge, in cases of this sort, to decide the right to begin, as far as can be, on some certain principle; and

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I think that on principle the defendant admits enough to entitle him to begin. Here the defendant admits all the plaintiff requires to entitle him to a verdict, except the single fact of the descent to *Sophia Richards*: that he proposes to defeat by a will which he will have to prove, and on that will is the single issue in the cause. If, instead of the general form and statement in ejectment, the titles had been deduced in the pleadings, the issue must have been on the will, and I think that is a correct mode of trying the question. I do not agree to the doctrine that the plaintiff is not bound to take an admission in any other case than that mentioned. I remember a case at *Nottingham* in which I was for the defendant claiming under a will: the plaintiff claimed under a prior will, which I admitted, and was allowed to begin. The defendant is, in my opinion, entitled to begin in this case.

Sir *J. Scarlett* accordingly opened the defendant's case.

For the purpose of proving the time of a marriage by which one of the witnesses had marked the date of a particular transaction, *Wilde Serjt.* offered an examined copy of the registry of marriage. The witnesses to the marriage, and the clergyman who performed the ceremony, were all alive.

Sir *J. Scarlett* objected, that for the purpose of marking time the registry was not evidence between strangers. This was no question of pedigree; the registry is only evidence to prove the

fact of marriage; for any other purpose, some of the witnesses to the marriage, or the clergyman, or one of the parties, should be called.

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Wilde Serjt. contra. The registry is made evidence by act of parliament; and he referred to *Rex v. North Petherton (a)*, in which he said it was decided that the registry of baptism was *primâ facie* evidence of the child being born on the day stated.

LORD DENMAN C. J. This must be evidence in itself, as the clergyman must be present, and it is his duty to enter the marriage correctly, and this fact of the time is within his own knowledge. In the case of the registry of baptism, the time of the birth must generally be taken by the clergyman from other people; and if the case cited goes to the extent stated, it cannot, I think, be supported. (b) But the present case is very different: and the registry of the marriage being made evidence, I think it is so for the purpose of proving all the facts there stated, necessarily within the knowledge of the party making the entry.

The evidence was accordingly received.

Verdict for the plaintiff.

(a) Reported in 5 B. & C. 508.

(b) It does not appear that the point in question was decided or admitted in that case; and, in the case of *Wiher v. Law* (3 Stark. N.P.C. 63.), *Bayley J.* ruled that an entry in a parish register of the christening of a child, as to the time of its birth, is not evidence of the age; and the court afterwards confirmed that ruling.

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Wilde Serjt., Follett, Bond, and Bere for the
plaintiffs.

Sir *James Scarlett, Bompas Serjt., Coleridge
Serjt., Erle, and Barstow* for the defendant.

EXETER.

Coram Ld. DENMAN C. J.

EXETER,
July 31.

REX v. WOODLEY.

An attorney
and steward of
a lord of a
borough is
bound to
produce
under a *sub-
pœna duces
tecum* public
documents re-
lating to the
borough; but
he is not
bound to
produce docu-
ments relating
to the lord's
interest in the
borough.

INFORMATION in the nature of *quo warranto*, calling
on the defendant to shew cause why he holds the
office of bailiff of the borough of *Ashburton*.

The attorney in the cause for the defendant,
who was also steward of the borough, and attorney
for Lord *Clinton*, lord of the borough, was called
by the relator on his *subpœna duces tecum* to
produce certain old precepts, books of presentment,
and a case on which the opinion of Mr. *Pratt*, af-
terwards Lord *Camden*, had been taken by a former
steward of the borough, relating to the office of
steward, and which had been handed over to the
attorney by the last steward. The case called for
was stated in the opening for the relator, to be
offered as evidence of the then reputation of the
borough.

The attorney, who was not sworn, objected to
produce the documents, on the ground that he held
them as attorney for Lord *Clinton*, and that it would
prejudice his interest to produce them.

Upon *Wilde's* proposing to argue the objection, Lord *Denman* C. J. expressed a doubt, whether counsel could be heard upon it; when *Wilde* stated, that a similar objection had been taken and argued by counsel in a case before *Holroyd* J.; and his Lordship, therefore, allowed the argument to proceed.

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Wilde. These documents are not such as an attorney is bound to produce. Lord *Clinton* is lord of the borough, and his interests may be materially affected by the production of the documents; his franchise may be diminished, and the value of his property and interest in the borough affected. Besides, the *subpœna* has not been served on the proper person; Lord *Clinton* is the real possessor, and he ought to be *subpœnaed*.

Erle and *Crowder* *contrd.* The only exception to the liability of an attorney to produce, is that of title deeds. These are not documents affecting the client's title, *Doe dem. Courtail v. Thomas*, 9 B. & C. 288. The attorney is clearly the proper person on whom to serve the *subpœna*.

LORD DENMAN C. J. It is quite clear, that there are two distinct characters in which Mr. *Smith* may hold the documents in question; his public character as steward, and his private as attorney of Lord *Clinton*; and there is a difference in the documents as respects these different characters. I am clearly of opinion, that he is bound to produce the documents which he holds as steward of the borough; and that the precepts, presentments, and

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books, are so held, and must be produced. With regard to the case and opinion, I think he holds them in his confidential capacity of attorney to Lord *Clinton*, and is not bound to produce them. I think the former steward held them as such, and ought not to have communicated their contents to any stranger; and they were handed over under the same terms.

The precepts were then produced; and were proved by the former steward. (a)

Verdict for the relator.

Erle and *Crowder* for the relator.

Wilde Serjt., *Follett*, and *Newman*, for the defendant.

(a) Vide *Mynn v. Joliffe*, *suprà*, p. 326.

EXETER.

Coram Ld. DENMAN C. J.

July 31.

TOTHILL v. HOOPER.

In an action against an overseer defending on behalf of the parish, an inhabitant is not rendered competent for the overseer by the stat.
54 G. 3. c. 170.

ASSUMPSIT by an apothecary against an assistant overseer of a parish, who had directed him to attend a pauper lying sick under a suspended order of removal. The defendant resisted the action by an order of vestry, on the ground of the unreasonableness of the charges, and offered the testimony of a rated parishioner, who had signed the order of vestry. It was objected, on the part

of the plaintiff, that the witness was inadmissible, and that this was not a case in which the stat. 54 G. 3. c. 170. s. 9. had removed his incompetency.

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 v.
 HOOPER.

Lord DENMAN C. J. held that the statute was inapplicable, and rejected the witness. (a)

Coleridge Serjt. and *Kekewich* for the plaintiff.
Crowder and *Elliot* for the defendant.

(a) Vide *Rex v. Inhabitants of Bishop Auckland*, *suprà*, p. 286.

BODMIN.
 Coram PATTESON J.

REX v. The Inhabitants of LANDULPH.

BODMIN.

INDICTMENT for the non-repair of a road.

The road in question led across a small inlet or estuary of the *Tamar* river, not far from its mouth. It was not passable at high water, and was usually a soft sludge at ebb.

The defence was, that the road was not a public highway at all; and if any, was one in its nature not capable of repair. It was also contended that this road was not in the parish of *Landulph*.

PATTESON J. held, in reference to the question of boundary, that where two parishes are separated by a river, and there is no positive evidence of the boundary line between them, it is to be

Where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them. Where a public way crosses the bed of a river, which washes over it at every high tide, and leaves a deposit of mud, *semble*, the parish is not bound to make it good.

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 REX
 v.
 The INHABI-
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presumed to coincide with the middle line of the channel.

Mr. J. *Patteson*, in summing up, directed the jury, that if they thought it proved by the evidence that the want of repair arose from the nature of the spot over which the alleged road passed, and was occasioned by the river flowing over it at every tide, washing away the materials placed there to form the road, and leaving in their place a deposit of mud, it would be absurd to require the parish to do repairs which from the nature of things must always be ineffectual. The jury would therefore in that case find a verdict for the defendants.

Verdict guilty. (a)

Follett and *Escott* for the prosecution.

Crowder and *Praed* for the defendants.

(a) It should seem that a public right of way may be established, subject to certain restrictions and impediments, which preclude the possibility of any effectual or durable repairs. Thus, though a parish is, in ordinary circumstances, liable to indictment for suffering a highway to remain under water, yet it is plain that where such a way crosses a ford, it must be enjoyed subject to a state of things which may sometimes render it impassable, and at all times inconvenient and unsafe. In neither this, nor any other case, is a parish bound to provide the best possible road, but only such a road as the public have heretofore accepted and enjoyed. Thus, in *Rex v. The Inhabitants of Cluworth*, 1 Salk. 358., it was ruled that "the defendants were not bound to put a footway in better condition than has been time out of mind, but as it has been usually at the best." In *Rex v. The Inhabitants of Stretford*, 2 Ld. Raym. 1169., an indictment, alleging a highway to be "*valde lutosa, et tam angusta ita quod* the Queen's people could not pass without

langer of their lives," was holden to be bad for not alleging that it was out of repair. In *Rex v. The Inhabitants of the County of Devon*, 4 Barn. and Cress. 670., the indictment averred that a public bridge was so narrow that the King's subjects could not pass without danger; but *per Bayley J.*, 'the public thought fit to take to it in the state in which it was originally given to them; and having so taken to it in that state, the law does not throw any obligation on the inhabitants of the county to alter it.'

In general, however, circumstances like the above, tending to abridge or defeat the beneficial enjoyment of a right of way, are given in evidence not to qualify, but to disprove it altogether.

REX v. CHAPPEL.

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WELLS,
 August 11.

INDICTMENT for larceny.

Gunning for the prosecution proposed to put in evidence the prisoner's examination before the magistrate, and to prove it by a by-stander. The examination had the prisoner's mark to it only.

Lord DENMAN C. J. refused to receive this evidence unless it were proved by the magistrate or his clerk; he observed that the necessity of proving the deposition in this manner had been doubted, but the distinction appeared to him to be, that where the examination of a prisoner before a magistrate is taken down in writing and signed with the prisoner's name, it need not be proved by the magistrate or his clerk: but if not signed by him, or if his mark only be attached to it, it is necessary to be proved by the magistrate or the clerk. For if the prisoner signs his name, this implies that

An examination of a prisoner taken before a magistrate signed with the prisoner's name may be given in evidence on the prisoner's hand writing being proved by any one present at the time of such examination. When the prisoner has merely put his mark, it must be proved that the examination was correctly read over to him.

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he can read, and that he has read the examination and adopted it. But if he has not signed it, or has only put his mark, there are no grounds to infer that he can read, or that he knows the contents, and no person can swear that the examination has been correctly read over to him except the person who read it.

The prisoner was convicted. (a)

Gunning for the prosecution.

(a) In a case which occurred at an earlier period of this circuit, Mr. J. *Patteson*, after much hesitation, yielded to the objection, that a prisoner's examination could not be admitted in evidence against him, unless the magistrate or his clerk were called to prove that the examination was properly taken; that was the case of *The King against Richards and Another*, who were tried before his lordship for larceny at *Salisbury*. At the close of the case for the prosecution, the examination of one of the prisoners was offered in evidence against him; and a person who was present, and saw the prisoner and the magistrate sign the examination, and heard the prisoner cautioned, was called to prove these facts. *Bingham*, for the prisoner, objected that this writing was inadmissible, unless either the magistrate or his clerk proved that the examination was properly taken: and he cited 2 *Hale's P. C.* ch. xxxviii. *Patteson J.*, after saying that his own opinion was strongly opposed to such a doctrine, yielded nevertheless to the authority of Lord *Hale*, in the passage cited. He therefore refused to admit the examination of the prisoner, — but added, that, had it appeared that the question had mainly turned upon the admission or rejection of the examination, he would have received the evidence, and have reserved the point; and that he by no means wished his present decision to be cited as a precedent. The prisoners were convicted.

The subject came before the same learned Judge on the trial of *Isabella Hope*, for feloniously administering poison, at the Central Criminal Court held in *Feb.* 1835. In that case the prisoner was a markswoman; neither the magistrate nor his clerk was called upon the trial; but a constable was called, who said

he was present at the time of the examination of the prisoner, that he heard it read over to her by the magistrate's clerk, that he saw the magistrate sign it, and saw the prisoner put her mark to it, and that he (the witness) then subscribed it as attesting witness: he did not however see the contents of the paper which the clerk read over. *Doane* for the prisoner, objected that either the magistrate or his clerk should be called: he referred to *Lord Hale's P. C.* vol. ii. ch. vii. and xxxviii.; and insisted that there was good reason for holding that either the magistrate or his clerk should be called, in order that the prisoner might have an opportunity of cross-examining him, as to whether the examination had been correctly taken down. Here, the constable did not see what it was that the clerk wrote down, nor what it was that he read aloud to the prisoner; he could merely say that he saw the clerk write something, which might, or might not, correspond with what he read aloud. *Vaughan J.* and *Patteson J.* were however of opinion that the examination was sufficiently proved, and might be read against the prisoner; and *Patteson J.* said, he was by no means satisfied that it was in any case necessary to call either the magistrate, or his clerk. Some of the books did indeed so lay down the rule; and he had reluctantly yielded to their authority on a recent trial before him on the Western Circuit (*a*), not, however, without expressing great doubt as to the propriety of such a rule. The present case was, however, quite distinguishable from that: here, there was an attesting witness, who had been called to prove the fact which he attested. He was clearly of opinion that the examination, so authenticated, was admissible in evidence against the prisoner. The examination was accordingly read, and the prisoner was convicted.

The words of *Lord Hale* certainly seem to warrant the inference which has been drawn from them in the modern treatises, as to the necessity of calling the magistrate, or his clerk. In the second volume of his *Pleas of the Crown*, ch. xxxviii., after saying that the examination may be read in evidence against the prisoner, he adds, "but then, oath must be made by the justice or coroner that took them, or the clerk that wrote them, that they are the true substance of what the prisoner confessed upon his examination;" and he lays down the same doctrine in ch. vii. p. 52.; but it seems difficult to as-

(a) See *Rex v. Richards*, referred to in an earlier part of this note.

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sign any satisfactory ground for the rule, and the practice of the learned judges has hitherto been by no means uniformly in accordance with it. Upon the whole, it would seem, that where the prisoner has signed the examination, the signature may be proved by any one present at the time of the examination, — but where the prisoner has merely affixed his mark, it must be proved further, that the examination was duly read over to him. In neither case, however, does it seem, on principle, requisite to prove the fact by the evidence of the magistrate, or his clerk: it would appear to be sufficient if the witness called for the purpose was present during the examination, so as to be able to prove that it was correctly taken, and that no undue influence was used over the prisoner's mind at the time of the examination.

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 Coram PATTESON J.

WELLS,
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COMBE v. CAPRON.

Where, in case for a malicious arrest, the declaration alleges certain facts "whereupon and whereby the suit was ended and determined," the plaintiff cannot shew any other determination of the suit than the mode stated. The acceptance of the debt and costs in satisfaction of the action, under a judge's order or a rule of reference, is a sufficient determination of a suit.

CASE for a malicious arrest.

The declaration, after stating the action and arrest, alleged, that thereupon proceedings were had, and it was referred to the prothonotaries to ascertain the debt due to the plaintiff in that action, and the costs to be in the discretion of the prothonotary. That the prothonotary found the debt to be 8*l.* 19*s.* 9*d.*, and ordered the plaintiff to pay the costs, "whereupon and whereby the said suit was ended and determined." Plea, that the defendant did not maliciously arrest, &c. and that the suit was not ended in manner and form as the plaintiff alleged.

Wilde Serjt., for the plaintiff, proposed to shew, that a rule had been obtained by the bail in the suit, to refer the actions against them and the original action to the prothonotary, and that he should

ascertain the sum due, and that the costs should be in his discretion; that the parties attended the prothonotary by their counsel, who found the debt as stated in the declaration, and that thereupon the plaintiff in the original action accepted the debt and costs in that action in satisfaction of the suit, but nothing further was done.

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Follett and *Ball* objected to the reception of the evidence. It is necessary to prove that the suit was determined, if at all, in the manner alleged. It is not alleged in the declaration that the plaintiff accepted the debt and costs in satisfaction of the suit, and even if it were, that would not be a sufficient determination. The declaration is bad in itself, and no evidence is admissible to shew any other facts which might make a legal determination. No order of the court to determine the suit is shewn. *Webb v. Hill*, 1 M. & M. 253.

Wilde Serjt. contended that the fact of the parties in the suit attending with their counsel the prothonotary, and his ascertaining the debt and costs, and the acceptance thereof by the plaintiff, was a sufficient determination of the suit.

PATTESON J. I am decidedly of opinion that a mere acceptance of the debt and costs, without the intervention of the court, is not what can properly be called a determination of the suit. The facts proposed to be proved in this case would, indeed, establish a sufficient determination of the suit. But then the question is, whether evidence of these facts is admissible; and I think it is not. It is necessary to prove the allegation as laid in

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the declaration, and unquestionably the mode stated in the declaration is not the one proposed to be proved; it is contended that, under the allegation of "whereupon and whereby," the plaintiff is let in to prove any mode of determination subsequent in point of time to the facts stated; but I think the meaning of these words is, that the suit was terminated by the facts stated, and in consequence of them. I know of no instance where these words have not been confined to a reference to the previous facts alleged.

Nonsuit.

Wilde Serjt. and *Stone* for the plaintiff.
Follett and *Ball* for the defendant.



HOWELL v. WHITE.

Where the plaintiff in trover claims under a sale, the defendant, under a plea that the goods are not the plaintiff's property, cannot shew the sale to have been fraudulent. The fraud must be pleaded.

TROVER for a waggon, three horses, and a quantity of harness.

Plea, that "the plaintiff was not possessed, as of his own property, of the said goods and chattels in manner and form," &c. and issue thereon.

For the plaintiff, it was proved, that *Richard Dunkerton*, who was tenant of a farm to a Mr. *John Whitehead*, sold the property at Bath to the plaintiff, an auctioneer, and that afterwards the landlord under whom the defendant claimed, followed the goods and seized them.

Follett, for the defendant, proposed to shew, —
 1. That the goods were not (*bonâ fide*) sold to the plaintiff, but that the pretended sale was a mere contrivance to protect the property; and, 2. That the

goods had been fraudulently removed by *Dunkerton* from his farm, in order to prevent his landlord from distraining them for arrears of rent; that the plaintiff obtained them with the knowledge of the fraud; that the landlord followed and distrained them, within thirty days, under 11 G. 2. c. 19. s. 1.; and that the defendant became the purchaser at the sale under the distress.

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Wilde Serjt., for the plaintiff, objected that, under the issue raised, it was not competent since the new rules for the defendant to do more than shew that no sale in fact took place; and that although *Dunkerton* might have fraudulently removed the goods within the meaning of the statute, still if the plaintiff actually bought the goods, though with knowledge of the fraudulent removal, the plaintiff was entitled to recover.

PATTESON J. was of that opinion, and observed that, in order to let in the second head of proof, the facts of the fraudulent removal and the distress should have been specially pleaded, in the same manner as if the action had been trespass. (*a*)

(*a*) See the general rules of *Hilary Term*, 4 W. 4. as to "pleadings in particular actions." The fourth rule (which is the one applicable to actions of trover) does not contain any express direction that where fraud is relied upon, it shall be specially pleaded, but it directs (No. 2.) that "all matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit;" and the Rule I. No. 3. directs, that in that form of action, "all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded."

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The learned Judge, afterwards, in summing up the case, left it to the Jury to say, whether the plaintiff did, in fact, buy the goods, observing that, if he did, although he might have known of the fraudulent removal, he was upon the present pleadings entitled to a verdict.

Verdict for the defendant.

Wilde Serjt. and *Stone* for the plaintiff.
Follett and *Butt* for the defendant.

BRISTOL.

Coram Ld. DENMAN C. J.

BRISTOL.

REX on the Prosecution of HENRY BARDINE
v. RICHARDSON and Others.

An indictment for a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained, is too general, and bad in point of law.

THIS was an indictment for a conspiracy, which alleged that an issue joined in an action of trespass between *Henry Bardine*, plaintiff, and *George Cox*, defendant, came on to be tried at the assizes for the county of *Somerset*, on the 13th of August, 1832, and that the plaintiff recovered a verdict for 17*l.*; whereupon the Judge certified, according to the statute, that in his opinion the execution ought to issue forthwith; that the defendants, contriving and intending, &c. “did conspire, confederate, and agree together, falsely and fraudulently to cheat and defraud the said *Henry Bardine* of the fruits and advantages of the said verdict and certificate, in contempt, &c.”

There was a count stating fully certain overt acts, and at the close of the case for the prosecution, which failed in proving the overt acts alleged.

Wilde Serjt., for the defendants, objected that the count above set out could not be sustained, inasmuch as it was too general, and stated no specific act by which the court could judge whether the conduct of the defendants was unlawful or not, or amounted to the legal offence of conspiracy.

For the prosecution it was contended, that a distinct fraud was alleged, and that any acts by which the defendants in concert attempted to prevent the plaintiff from getting his costs and damages, might be given in evidence under the averments. If the jury thought the acts proved to be fraudulent, the indictment was sustained; and the case of *Rex v. Gill*, 2 B. & Ald. 204. was cited.

LORD DENMAN C. J. As this case has been fully argued, and it seems to be the wish of both parties that I should decide on the validity of this indictment here, I will give my opinion on it now, and that opinion is, that the indictment is bad in point of law. The allegation is too general, and does not convey any specific idea which the mind can lay hold of to judge whether any unlawful act has been done or attempted. The terms used do not import in what manner the prosecutor was to be deprived of the fruits and advantages of his verdict, and it is not even alleged that the verdict would lead to any fruits and advantages. It is essential that the parties should conspire to do something which the law may contemplate as an illegal act. Supposing particular property were removed from the premises of the defendant which might lawfully be removed, this could not subject the parties removing such property to an indictment for conspiracy, though

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the consequence of such an act may have rendered the verdict abortive. The most general form I find recognised is that in the case cited ; namely, “ to cheat and defraud a party of his goods and moneys.” But there an offence at common law is clearly and distinctly stated, not in figurative and doubtful terms, but in words to which the law assigns a specific meaning. Here no such certain and specific allegation is to be found, and I therefore think this indictment ought to be quashed.

Bompas Serjt., *Erle*, and *Smith* for the prosecution.

Wilde Serjt., *Follett*, and *Butt* for the defendants.

YORK.

Coram Ld. LYNDHURST, C. B.

YORK.

WINTER *v.* WROOT.

In an action for crim. con. evidence may be given, in reduction of damages, that the wife, before the criminal intercourse took place, had complained of her husband's treatment of her.

THIS was an action for crim. con.

Pollock, for the defendant, in cross-examination asked one of the witnesses for the plaintiff, who was called to prove the terms on which the parties lived together, if, before the alleged criminal intercourse, he had ever heard the plaintiff's wife complain of her husband's treatment of her.

Alexander for the plaintiff objected, that the wife's complaints, not in her husband's presence, could not be evidence against the husband.

Lord LYNDHURST. I think the complaints of the wife are evidence as shewing the terms upon

ich the parties lived together. That is made of a number of acts of the two parties, of which such complaints form part. I think, therefore, the witness may be asked generally, whether wife made complaints of the manner in which husband treated her. (a)

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The question was accordingly put, and answered the affirmative. The counsel for the defendant not attempt to obtain the particulars of the treatment which gave rise to the complaint of the wife.

A verdict was afterwards taken for the plaintiff by consent, with 40s. damages.

Alexander and S. Temple for the plaintiff.
F. Pollock and Cresswell for the defendant.

(a) See *Trelawney v. Coleman*, 2 Stark. N. P. C. 191.

CITY OF YORK.
Coram Ld. LYNDBURST, C. B.

REX v. JOSEPH WEBB.

YORK,
July 19.

HIS was an indictment for manslaughter. The first count of the indictment alleged, that the prisoner feloniously assaulted one *Richard Richardson*, and feloniously and wilfully administered to him, and persuaded and procured him to take and swallow, divers large and excessive quantities of certain noxious, destructive, and deleterious substances being at the time procurable, and that dangerous remedy causes death, — the person so administering it is guilty of manslaughter. In an indictment for manslaughter it is not necessary to allege the causes, merely the act, which conduced to the death of the party; it is sufficient to allege truly the act with which the prisoner is charged, if that act accelerated the death.

Where a person grossly ignorant of medicine administers a dangerous remedy to one labouring under disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, — the person so administering it is guilty of manslaughter.

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stances; to wit, 20 ounces weight of gamboge, and 20 ounces weight of aloes, and divers, to wit, 20 ounces weight of certain other noxious, destructive, and deleterious substances to the said jurors unknown, as and for wholesome and proper medicine for the cure of him the said *R. R.* for a certain disease, to wit, the smallpox, under which he the said *R. R.* during all the time aforesaid did labour; and that the said *R. R.*, not knowing the said substances so administered in such quantities as aforesaid to be noxious or injurious, but supposing the same to be wholesome and proper medicines administered in proper quantities, did upon the advice and by the procurement of the prisoner take and swallow, &c. said noxious, &c. substances in the large and excessive quantities aforesaid, by means whereof, that is to say, by the so taking, &c. of the said noxious, &c. substances in the excessive quantities aforesaid, and by the operation thereof, the said *R. R.* became and was mortally sick, and on the 27th of *June* of the said noxious &c. substances so taken, &c. and of the operation thereof, and of the mortal sickness occasioned thereby, died, and so the jurors, &c.

There were three other counts, substantially the same as the first; and differing principally in the description of the drugs administered. The fifth count charged, that the deceased was labouring under the smallpox, and that the prisoner, being a person who had no knowledge or skill in medicine, or in the curing of the said disorder, and who had no licence or authority whatever to prescribe for, or administer medicine to any person afflicted with any sickness, &c. wilfully and feloniously did take

upon himself the supplying the deceased with wholesome and proper medicines for the cure of the said disorder, and the treatment, &c. of the deceased, and under the pretence of curing the deceased, administered to him divers large and excessive quantities of noxious, &c. substances, to wit, 20 ounces of gamboge, and 20 ounces of aloes, and caused the same to be taken and swallowed by the deceased, and did feloniously neglect to administer to the deceased wholesome and proper medicines, and did wilfully and feloniously cause the deceased to be kept in a close and confined state and situation, without sufficient air; and the count then averred the sickness and death of the deceased by such improper treatment, and by the swallowing the said noxious substances, &c.

There were other counts, not substantially differing from the fifth.

It appeared by the evidence for the prosecution that the deceased, *Richard Richardson*, at the time mentioned in the indictment (*June 1834*), was an apprentice to a linen-draper at *York*, in whose house he resided, and was between twenty and twenty-one years of age. *Webb*, the prisoner, kept a public house in *York*, and was agent for the sale of a quack medicine, called "*Morison's Pills*." On the 16th of *June*, the deceased was taken ill of a disorder which turned out to be the smallpox: on the following day, he expressed a wish that the prisoner *Webb* (who was a relation of his master's) should be sent for, and *Webb* accordingly attended him daily, until the 27th of *June*, when the deceased died. As soon as the prisoner commenced his attendance, he administered twenty of *Mori-*

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... one dose to the deceased, and from ... until death took place he continued ... the same pills in different quantities, ... occasionally with his own hand.

... was proved that these pills were composed of ... active and dangerous ingredients, — and ... amongst others of gamboge. The deceased became much reduced, but the prisoner, notwithstanding, continued dosing him with the pills until within a few hours of his death. As evidence of the ignorance of the prisoner, it was proved that on the morning of the day when the death occurred, and when any moderately-skilful practitioner must have foreseen that event, the prisoner assured the relatives of the deceased that he was going on favourably. It appeared that the prisoner had been very kind and attentive to the deceased during his illness, and the deceased had recovered of a dangerous illness, some years before, under the prisoner's treatment. It did not appear that the prisoner had made any charge, or received any payment, for his attendance on the deceased, excepting that he had charged and been paid the usual price for the boxes of pills administered to the deceased.

Several medical practitioners were examined for the prosecution, some of whom had examined the body after death. They all condemned the treatment pursued by the prisoner, and gave it as their opinion, that the exhibition of *Morison's* pills in such doses must have aggravated the disease under which the deceased laboured, and have accelerated his death. One of them said the deceased had died of smallpox, heightened by the treatment he



not received: whether, under a different mode of treatment, the smallpox might still have proved fatal to the deceased, the witnesses could not take upon themselves to say.

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The case for the prosecution being closed, *Pollock*, *Atcherley* Serjt., and *Alexander* for the prisoner, submitted that there was no case to go to the jury. They insisted that where a party, without any bad intention, but with a view to give relief, administers a medicine which happens to prove fatal, the party who may thus unintentionally have caused death, cannot be guilty of a *felonious* killing, even though he acts without a regular licence or authority to practise medicine; and they cited 1 *Hale*, P. C. 429. 4 *Black. Com.*, c. 14. p. 197. If, indeed, the party assumes a false character, and pretends to be, when he is not, a member of the medical profession, the case may be different. But unless there be such false assumption of a professional character, ignorance alone, however gross, is not enough to make a man criminally responsible; there must at least be negligence. Thus, if a man wilfully or even negligently drive over another and kill him, it is murder or manslaughter as the case may be; but has such a charge ever been brought against any one for the consequences of *unskilful* driving? Lastly, even supposing that ignorance alone would make a party criminally responsible, such ignorance must, at all events, be of the grossest kind: *Rex v. Williamson* (a), *Rex v. St. John Long*. (b)

(a) 3 Carr. & P. 635.

(b) 4 Carr. & P. 398. 423.

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Lord LYNDHURST C. B. (without hearing *Starkie* and *Dundas* on the other side). I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a licence. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter: but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord *Ellenborough* in *Rex v. Williamson*. I shall leave it to the jury to say, first, whether death was occasioned or accelerated by the medicines administered; and, if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that, in so administering the medicines, he acted either with a criminal intention or from very gross ignorance.

Pollock then insisted, that none of the counts of the indictment were supported by the evidence. Giving the utmost effect to the evidence, it only comes to this, that the deceased died of a natural disorder, viz., of the smallpox, accelerated by improper treatment. It may be conceded, for the sake of argument, that if the indictment had so

stated the case, it might have been sufficient ; but the indictment makes quite a different charge, viz., that the party died wholly and solely of a mortal sickness, caused by the medicine and the improper treatment. The pleader has framed his charge as if the smallpox had had nothing to do with the death of the party ; although there is not the slightest pretence for saying, that the deceased would have died had it not been for that disease.

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Starkie and Dundas, contra. It is not necessary in indictments to allege the cause, merely natural, which may have conduced to the death. It is enough (and all the precedents will be found to be framed on that principle), if the indictment truly allege the act with which the prisoner is charged. Indictments do not ever set out the state of body in which the deceased may have been, though that state of body may, in most cases, more or less have assisted the fatal act of the prisoner. The only question is, whether *Richardson's* life was terminated on the 27th of *June* owing to the improper treatment of the prisoner.

LORD LYNTHURST C. B. It is true the witnesses do not say whether the deceased would, in their opinion, have died of the smallpox if the pills had not been administered. But they all agree in this, that his death was accelerated by the pills.

Now, their evidence being translated comes to this, that the party died on the day when he did die, viz., on the 27th of *June*, by reason of having taken the pills. At present, therefore, it appears to me that the indictment is good : if in the result

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I should entertain any doubt, I will reserve the point for the prisoner.

In order to disprove the allegation in the indictment, that the pills were noxious and deleterious, the prisoner called witnesses to prove that the pills had effected the cure of various diseases, smallpox included. It became necessary to prove that the pills spoken of as having effected these cures, were identical in composition with those administered to the deceased. Mr. *Moat*, who described himself as co-proprietor of *Morison's* pills, was examined for this purpose. He was asked in cross-examination, whether the pills spoken of by the witnesses had *gamboge* in them? The witness declined answering this question, and claimed the protection of the Court, inasmuch as in this mode the secret of his invention (for which he had not any patent) might be made public, to his great loss.

LORD LYNTHURST C. B., however, decided that the witness must answer the question; though he suggested to the counsel for the prosecution the propriety of not going further into this subject than the ends of justice required.

The witness then answered the one question already put, and the prosecutor did not follow it up with more.

The case then went to the jury.

His Lordship, in summing up, adhered to the opinion he had already expressed on the argument: he left it to the jury to say whether the

death of the deceased had been occasioned or accelerated by the medicines administered by the prisoner ; and if so, whether they thought he had been guilty of any criminal intent in so administering them, or had done so from gross ignorance. In either of these events it was their duty to convict the prisoner.

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The jury found the prisoner guilty.

The prisoner was on a subsequent day brought up for judgment. The Lord Chief Baron stated, that he had fully considered the objection taken to the indictment, and was satisfied there was no weight in it. The prisoner was then sentenced to six months imprisonment.

Starkie and *Dundas* for the prosecution.

F. Pollock, *Atcherley* Serjt., and *R. Alexander*, for the prisoner.

CASES AT NISI PRIUS.

IN THE COURT OF COMMON PLEAS AT
LANCASTER.

Coram Ld. DENMAN C. J.

WRIGHT v. BECKETT. (a)

LANCASTER,
Aug. 1853.

Where a witness gives evidence destructive of the case which he was called to prove, the party calling him may, in order to neutralize his evidence, shew that he had before the trial given to the attorney an account of the transaction entirely different from that sworn to by him at the trial—*per Lord Denman, C. J., dissentiente Bolland B.*

THIS was an action of trespass *quare claus. freg.* The question between the parties was, whether the plaintiff had the exclusive right to the soil of a piece of marshy land.

The plaintiff's counsel, having examined four witnesses to prove that the plaintiff and his predecessors had immemorially exercised acts of ownership over it, called a fifth person, of the name of *Warrener*, with a view to establish the same fact. *Warrener*, however, on being examined, contradicted the other four witnesses; and the plaintiff's counsel thereupon asked him, whether he had not given a different account of the facts to the plaintiff's attorney two days before? The question was objected to by *Jones Serjt.*, for the defendant, on the ground that the obvious tendency of the question put by the plaintiff was to discredit his own witness. Lord *Denman C. J.* however, over-ruled the objection, and the question was put. The witness gave an evasive answer to the question. The plaintiff's counsel, thereupon, called the plaintiff's attorney, and proposed to ask him whether the witness *Warrener* had not given to him, upon the occa-

(a) This case was unavoidably omitted in its proper place.

sion referred to, an account of the facts different from that now given by him in court?

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Jones Serjt., for the defendant, again objected: but the Lord Chief Justice allowed the question to be put. The plaintiff's attorney answered it in the affirmative, and added, that he took down in writing the account so before given by *Warrener*, and that it was read over to *Warrener*, who said it was quite correct, and the plaintiff's attorney now read that written account to the jury.

The Lord Chief Justice, in summing up the case to the jury, told them, that they were not to look upon the statement given by *Warrener* to the attorney before the trial, and read at the trial by the attorney, as evidence of the facts therein stated: they were only to receive that statement by way of neutralizing the effect of the evidence which *Warrener* had unexpectedly given in court.

The jury having found a verdict for the plaintiff,

Jones Serjt., on the following morning, moved for and obtained a rule, to shew cause why the verdict should not be set aside and a new trial had, upon the ground that the evidence of the plaintiff's attorney had been improperly received.

In the course of Hilary term, 1834,

F. Pollock and *Crompton* were heard at considerable length against the rule, before Lord DENMAN C. J. and Mr. Baron BOLLAND, in *Serjeant's Inn*: and *Jones Serjt.* and *Addison* were

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heard in support of the rule. The arguments and authorities relied upon by each side are so fully discussed in the judgment given by the learned Judges, that it has been thought inexpedient to repeat them in this place.

Lord *Denman*, at the close of the argument, said it was a most important case ; and that, before the learned Baron and himself decided it, they would take an opportunity of speaking to the other Judges on the subject.

Cur. adv. vult.

In the course of Hilary vacation, 1834, the learned Judges, differing in opinion on the case, delivered their respective judgments to the following effect :—

LORD DENMAN C. J. The question which has been argued before us, arose in this manner :— Four witnesses, examined on the plaintiff's part, gave evidence which, if believed, established his case ; he then called a fifth, whose testimony, if believed, defeated the plaintiff's case, and fully proved that of the defendant. It was then proposed by the plaintiff to shew that this same witness had formerly given a completely different account at another time. The mode of doing this, was by producing the statement taken down shortly before the trial, from his own lips, by the plaintiff's attorney. The object of the evidence tendered, was to shew the untruth of what he swore upon the trial : we are now to consider whether I did right in permitting this contradiction to be proved.

Notwithstanding my respect for the different opinion which is entertained by my learned brother now present, and, as I believe, by others of great weight and authority, I retain that on which I acted at *Lancaster*.

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The case was brought by what occurred to this simple point,—to which of the witnesses credit was due. If to the first four, the plaintiff was entitled to the verdict; if to the last, the defendant. On this issue alone the event of the cause depended. The defendant enjoyed the privilege of assailing the credit of those who were opposed to his interest: the plaintiff must have the same right with respect to that witness who unexpectedly turned against him, unless he is debarred by some strict rule of law.

I find no such rule, but many decisions which must have proceeded on the opposite principle. There is a passage, indeed, upon this subject in *Buller's Nisi Prius*, to which, as I understand it, I most fully subscribe:—P. 297. “A party never shall be permitted to produce general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.”

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But I consider the meaning to be, that no party shall produce a witness whom he knows to be infamous, and whom he has, therefore, the means of *discrediting by general evidence*. No inference arises, that I may not prove my witness to state an untruth, when he surprises me by doing so, in direct opposition to what he had told me before. In this case, the discredit is consequential, and the evidence is not general but extremely particular, and subject to any explanation which the witness may be able to afford. The rule laid down in *Buller's Nisi Prius*, therefore, appears to me inapplicable.

Two dangerous consequences are, however, apprehended from admitting the former statement of a witness, in contradiction to his testimony on the trial.

Now, I must observe in passing, that the Judge's apprehension of possible danger on admitting certain evidence, cannot create a rule for excluding it. The legislature may make such a provision, or the rule may have so far prevailed in practice, as to be properly considered parcel of the common law. But if, instead of acting on established rules, we were now conferring on what rules it would be best to establish, the inconvenience of precluding the proof tendered strikes my mind as infinitely greater than that of admitting it. For it is impossible to conceive a more frightful iniquity, than the triumph of falsehood and treachery in a witness, who pledges himself to depose to the truth when brought into Court, and, in the meantime, is persuaded to swear, when he appears, to a completely inconsistent story.

The dangers on the other hand, though doubtless very fit subjects of precaution in the progress of a trial, exist at present, in an equal degree, with reference to modes of proceeding which have never yet been questioned.

The most obvious and striking danger is that of collusion. An attorney may induce a man to make a false statement without oath, for the mere purpose of contradicting by that statement the truth, which, when sworn as a witness, he must reveal. The two parties concerned in this imagined collusion must be utterly lost to every sense of shame as well as honesty. But there is another mode by which their wicked conspiracy could be just as easily effected. The statement might be made, and then the witness might tender himself to the opposite party, for whom he might be first set up, and afterwards prostrated by his former statement. This far more effectual stratagem could be prevented by no rule of law.

The other danger is, that the statement, which is admissible only to contradict the witness, may be taken as substantive proof in the cause. But this danger equally arises from the contradiction of an adverse witness: it is met by the Judge pointing out the distinction to the jury, and warning them not to be misled. It is not so abstruse but that Judges may explain it, and juries perceive its reasonableness; and it is probable that they most commonly discard entirely the evidence of him who has stated falsehoods, whether sworn or unsworn.

I proceed now to observe upon the cases cited.

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In *Alexander v. Gibson* (a), the plaintiff's first witness disproved his case. It was an action on the warranty of a horse, and the defendant's servant swore that he sold the horse without a warranty. Another witness was then called to prove the contrary: and the learned counsel objected that the plaintiff was not at liberty to contradict his own witness. "Lord *Ellenborough*. — If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed. But I know of no rule of law by which the truth is on such an occasion to be shut out, and justice is to be perverted. In *Lowe v. Joliffe* (b), which turned on the validity of a will, all the attesting witnesses swore to the insanity of the testator when the will was executed; but they were contradicted by other evidence, and the will was established."

The case of *Lowe v. Joliffe* would have seemed to make an end of the antiquated notion that a party cannot contradict his own witness; and it may be observed that neither in that case nor in *Goodtitle v. Clayton* (c), did Lord *Mansfield* distinguish between such witnesses as are made indispensable, as the formal subscribers to an instrument, and those who may be required to prove facts of any other description. Indeed, it seems impossible to found such a distinction on any principle, though in a subsequent case of *Richardson v. Allan*, reported by Mr. *Starkie* in

(a) 2 Campb. 556.

(b) 1 Blackst. R. 365.

(c) 4 Burr. 2224.

the 2d vol. of his *Nisi Prius Cases*, 334., it was adverted to by Lord *Ellenborough*. That most learned writer on the law of evidence does, however, state in a note, that his lordship appeared to have taken an erroneous view of the case he was then reporting.

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We advance no farther by these authorities than to the doctrine, that a party may so far contradict the witness he calls, as to prove by others the fact which that witness denies. This much is now conceded: and the question is, whether for the purpose of showing his present statement incorrect, you can be allowed to contradict your own witness not by others, but by his own previous and contradictory assertions. A case of murder was tried at *York*, in 1805, before Baron *Graham*. Several witnesses having been called for the prosecution, the prisoner's counsel then observed the name of another witness, indorsed on the bill of indictment, but the counsel for the prosecution declined to call her. The Judge thought it his duty to call her: and her evidence went to an acquittal. The Judge then cast his eye over her deposition taken before the coroner, and finding it totally at variance with what she now swore, caused that deposition to be proved, and in summing up to the jury, threw her testimony out of the case. The twelve Judges on consideration confirmed the correctness of the learned Baron's proceeding, Lord *Ellenborough* and C. J. *Mansfield* observing that they thought the prosecutor had the same right as the Judge. (a)

This decision does not incur the danger of col-

(a) *Rex v. Oldroyd*, R. & R., C. C. R. p. 88.

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lusion, as the parties who conducted the prosecution neither called nor contradicted the witness. But it proves that a former declaration may be given in evidence to contradict what the same witness has sworn to on the trial, notwithstanding the danger of that declaration being believed, and acted on as evidence in the cause: and it prepares the mind for considering the very question now before us. For the prosecutor would have undoubtedly been justified in expecting the evidence in court to agree with that given before the coroner, and in summoning the witness into the box with that expectation. If he had done so, and had heard her with astonishment gainsay the deposition from which he examined her, could he have been prevented from neutralising the evidence, and defeating the attempted fraud by laying that deposition before the jury?

I am able to state, on authority, to which I give entire credence, that this course was permitted by one of the most learned of Judges, Baron *Bayley*, with the concurrence, too, of Mr. Justice *Holroyd*. Mr. *Alexander*, at the trial, as *amicus curiæ*, referred to a case, of which he has since favoured me with the following note taken by himself at the time. “*Rex v. Margaret Boyle and another, coram Bayley J. Lancaster Spring Assizes, 1823.* A witness for the prosecution, on being examined, gave a different account of the transaction from what he had deposed to before the committing magistrate. The counsel for the prosecution proposed to contradict him by proving the deposition, which was objected to by *Coltman* on the part of the prisoner. *Bayley J.*, after consulting with

Holroyd J., admitted the proposed contradiction, and the prisoner was convicted." I am bound to add, that the eminent Judge has no remembrance of this decision, and I find, on debating the matter with him, that his present opinion is against it. But I cannot help thinking that *Rex v. Oldroyd* appeared to him when cited, as it does to me, a conclusive authority for the principle now under controversy.

The important case of *Ewer v. Ambrose* (a) furnishes materials for both sides of this argument. In that action the defendant pleaded in abatement, that he made the contract jointly with another, who was called to prove the plea. He disproved it. The report states, "the defendant's counsel, *in order to prove that he was a partner*, proposed to read in evidence his answer to a bill filed in chancery, wherein he admitted himself to be one." My brother *Gaselee* received the evidence, though with some hesitation, because the defendant contradicted his own witness. Others were also admitted to prove him a partner, subject to the same doubt. The learned Judge left it to the jury to find for the plaintiff or the defendant, according as they *gave credit to B.'s answer in Chancery, or to his testimony in court*: and they found for the defendant. The three learned Judges then in court were clearly of opinion that the direction was wrong, inasmuch as the answer in Chancery, if it were admissible at all, could only be received to contradict the witness, and not to substantiate any fact.

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(a) 3 B. & C. 746.

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Whether it were admissible, the case did not require the Court to decide. My brother *Bayley* said, the impression of his mind was against it: my brother *Littledale* and the late Mr. Justice *Holroyd*, whose profound learning did not exceed his acuteness, sagacity, and caution, may be considered as studiously withholding their assent to the opinion previously pronounced. The latter, after observing that the answer was clearly not admissible to prove substantively the partnership, thus proceeds: "But it is a very different question, whether it was not evidence to destroy the credit of the witness as to the particular fact to which he swore." A note subjoined to this case by the learned reporters, in the spirit of liberal discussion, must not be passed unnoticed. They say that the reason of the rule, as laid down in *Buller's Nisi Prius*, extends to the exclusion, not merely of general evidence, but of all evidence which is offered merely for the purpose of discrediting the witness, and which is not *per se* evidence in the cause. In answer to which, however, I must remark, that a judge can only be warranted in withholding important truth from the jury, by the existence of a positive rule of practice. The proof that such a rule has prevailed, I respectfully take from the valuable work in which it is recorded; but the writers do not authorize me to introduce a larger rule, by giving a reason for the actual rule, which might have carried it farther. But neither do I agree that this larger rule would have followed as a consequence of the reason assigned. For the word "credit" appears to me manifestly to be employed in the sense of general character; and thus understood,

the rule and the reason go well together, and are perfectly consonant to common sense;—"You shall not prove that man to be infamous, whom you endeavoured to pass off to the jury as respectable." But how can this prevent me from shewing that he states an untruth on a particular subject, by producing the contrary statement previously made by him, which gave me just cause to expect the repetition of it now. If his character is injured, it is not directly, but consequentially: but perhaps no injury may arise: there may be a defect of memory; there may be means of perfect explanation. If not,—if the witness professing to be mine has been bribed by my adversary to deceive me,—if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly invented falsehood, which defeats my just right, and throws discredit on all my other witnesses,—must I be prevented shewing the jury facts like these? Suppose that in some dispute happening in the street a by-stander declares his name to one of the contending parties, and his readiness to prove his conduct blameless; that he attends the solicitor, and gives in his deposition to the same effect, but, when sworn in open court, takes part with the adversary. The question then is, whether he is to be believed, or the other witnesses called by the same party. Some one in court happens to know him, and whispers to the attorney, "He has deceived you in every way; he has given you a false name; he is the adversary's brother and partner: moreover, he has been for years notoriously infamous." Or, suppose

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such a trial for misdemeanor as some that have lately revolted the public mind ; and that some stranger, after voluntarily offering his testimony to a calumniated man, should unexpectedly side with his false accuser. If the rule against *discrediting* your own witness must be strictly construed, these deceptions cannot be exposed. You will be told that you have called him ; you must take him for better and for worse, and must be bound by all his statements. Or if you are permitted, by reason of your late discovery of these facts, to prove them for your own necessary protection, this must be, because the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in the witness box. The rule, therefore, is limited by that condition ; and you shall be at liberty to discredit your witness by general evidence, because you have been deceived and surprised. Can any reason then be assigned, why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from shewing the contradiction into which, from whatever motive, he has fallen ? It is clear that, in civil cases, the exclusion might produce great injustice, and, in criminal cases, improper acquittals and fraudulent convictions. Indeed, the case of *Ewer v. Ambrose* presents a *reductio ad absurdum* which can hardly be surpassed. For if the answer could not have been received at all, the same man might defeat, on the same day, a suit in Chancery, and an action at law, by swearing in the former to the affirmative, and in the latter to the negative of the same proposition.

In the case of *Friedlander v. The Royal Exchange Assurance Company* (a), I was concerned for the plaintiff, and tendered evidence in contradiction to a witness whom I had called. Lord *Tenterden* refused this evidence, on the ground that I could not be allowed to contradict my own witness. I obtained a rule for a new trial, which was made absolute by my Brothers *Parke*, *Taunton*, and *Patteson*: but their judgment is hardly an authority for the view which I take of the present case, as they considered the very facts in which the contradiction consisted material in the cause.

In *Bernasconi v. Fairbrother*, which occurred before myself at nisi prius, last year, I permitted an attorney to prove that the witness, immediately before the trial, had made to him a statement of his evidence quite opposite to what he swore, to neutralise that swearing. The act of bankruptcy was established by no other witness: the plaintiff was nonsuited, and moved for a new trial, on the ground of surprise. My only reason for mentioning this case is, to shew that the subject has been repeatedly brought before me: I have taken the greatest pains to arrive at a just conclusion, and cannot change my opinion without arguments of more weight than I can discover in those by which a contrary rule is supposed to have been established.

As to the manner in which this question was raised in the present case, it is proper to report, that, before the witness was cross-examined gene-

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rally, as to his having at a former period given a different statement, the right so to cross-examine was denied, and the first question objected to. My Brother *Jones*, on my deciding that the question might be put, called for the written statement itself. I remember his expression, "Let us see the sheet of your brief that sets out his evidence." If, therefore, that general question may be put, but the particulars cannot be gone into, the first ruling was proper, and the objectionable part was introduced by the party affected by it. But, though the answer to the general question of that nature is less likely to be mistaken for substantive evidence in the cause, I frankly own that this makes no difference whatever in my judgment. On the contrary, I think that if the cross-examination be admissible, the only proper way of conducting it is, by proving the witness's former statement in the most distinct and authentic manner.

The result is, that, finding no direct authority compelling the exclusion of such evidence, and some which appear to me on principle to prove it admissible, and thinking that truth and justice may be most materially affected by that exclusion, I am bound to abide by the course I pursued at nisi prius, and must give my judgment against making the rule absolute.

BOLLAND B. The question to be decided on the trial was, whether the plaintiff had an exclusive right of soil and possession of the uninclosed marsh; for a trespass upon which by the defendant the action was brought. After several wit-

nesses had been examined, whose testimony established the case of the plaintiff, a person of the name of *Warrener* was called by the plaintiff, whose evidence was not only destructive of the right insisted upon by the plaintiff, but, if credited, clearly made out the case of the defendant. The counsel for the plaintiff proposed to call Mr. *Mallady*, the attorney for the plaintiff, to prove that he had examined the witness some days previous to the trial, and that the account he then gave was directly contradictory to the evidence he had just given to the Court. The witness was objected to by the plaintiff's counsel, but the learned Judge thought his testimony was admissible; and Mr. *Mallady* was examined to establish the contradiction. I have most attentively considered all the cases cited in the arguments before us, and I am of opinion that the evidence of Mr. *Mallady* ought not to have been received, and that the rule for a new trial should be made absolute.

The rule applicable to this question is, as it seems to me, that which has been relied upon by my brother *Jones*; viz., that a party in a cause is not to be permitted to give evidence of a fact, for the purpose of discrediting his own witness, unless such fact would of itself be evidence in the cause; but that where such fact is relevant to the issue, and so *per se* evidence in the cause, such proof is to be allowed to be given, although it may collaterally have the effect of discrediting the testimony of his own witness.

The passage cited from Mr. Justice *Buller's* treatise on the law relative to trials at nisi prius, p. 297., taken altogether, warrants this distinction;

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for after having laid it down that a party shall not be permitted to give general evidence to discredit his own witness, the learned author goes on to state,— “but if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise, for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.” By these words the learned writer points out in what manner and to what extent a party shall be allowed to impeach the credit of his own witness, in contradistinction to that “general evidence,” of which he had made mention just before. The cases of *Ewer and Another, Assignees v. Ambrose and Another*, (a) and *Friedlander v. The London Assurance Company*, (b) were decided upon the principles laid down in the above rule ; and it is worthy of observation, that the general leaning of the late Lord *Tenterden*’s mind was so strong against allowing a party to discredit one of his own witnesses, that when the latter case was before him at nisi prius, he appears to have considered, though mistakenly, as the Court afterwards thought, that all such evidence was inadmissible.

I think that great weight is due to the argument founded on the danger of collusion ; it is, indeed, in my mind, the main objection to the reception of the evidence.

The case of *Rex v. Oldroyd* reported in the first volume of *Crown Cases* by Russell & Ryan, p. 88.,

(a) 3 B. & C. 746.

(b) 4 B. & Adol. 193.

has been much relied on by Mr. *Crompton* for the plaintiff. I cannot, however, consider the case itself, as decided by the Judges upon the point before them, as an authority upon the question in the present case: the only assistance afforded to the plaintiff by that case is to be derived from the opinion thrown out by Lord *Ellenborough* and *Mansfield* C. J., which appears at the end of the report. The prisoner was indicted for the murder of his father. The counsel for the prosecution, at the close of their case, observed to the learned Judge that they did not mean to call the mother of the prisoner, as strong suspicion had fallen upon her as to her having been an accomplice: as, however, her name was on the back of the bill as having been examined before the grand jury, the learned Judge thought it right to have her examined. The evidence given by her was in favour of the prisoner, and materially different from her deposition before the coroner; and the learned Judge thought it proper to have the deposition read, for the purpose of affecting the credit of her testimony given on the trial; and on summing up the case to the jury, he stated that her testimony was not to be relied on, and left the matter of the prisoner's guilt entirely upon the other evidence. The jury convicted the prisoner, and the Judges decided the conviction was right. It is to be observed, that the determination of the Judges was confined to the right of a *Judge* to call for a witness's deposition, in order to impeach the credit of such witness, who on the trial contradicts what he had before deposed. It is, however, further stated, in the report, that Lord *Ellenborough* and *Mansfield*

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C. J. thought the prosecutor had the same right, and upon that opinion the counsel for the plaintiff in the case now before us places much reliance. It is clear that the counsel for the prosecutor did not consider that he possessed such right, or he would have called the witness, at all events, and availed himself of her evidence, if favourable, knowing that he could destroy it, if she gave evidence contrary to that which she had given before the coroner, by putting in her deposition. To do this, it is, I think, clear that the counsel had no right. It is one of the instances given by Mr. Justice *Buller*, p. 297., of the evil that would result from a party being permitted to produce general evidence to discredit his own witness. His words are, "For that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him." All doubt upon this point is set at rest since the decision of *Ewer v. Ambrose*, before cited. (a) With the exception of the opinion of the two learned Judges in *Rex v. Oldroyd*, the authorities are uniform in establishing, that a party cannot contradict his own witness but by giving evidence of facts bearing upon the issue. It was open to the plaintiff to do so in the present case, but he was not at liberty to prove that his witness, *Warrener*, had previously made a different statement to the attorney, because that was a matter not relevant to the issue in the cause; nor was the statement entitled to

(a) 3 B. & C. 746.

such weight as a contradiction, as to have the power of neutralizing the evidence (one of the reasons urged for its admission), it not having been given upon oath. It furnished a sufficient apology for putting *Warrener* in the brief, and calling him, but could go no farther. In the case of *Ewer v. Ambrose*, the evidence by which it was sought to contradict the witness was, his answer in Chancery. In *Rex v. Oldroyd*, the contradiction was supported by the witness's deposition before the coroner.

For these reasons I am of opinion, the evidence of the witness, *Mallady*, was improperly received at the trial; but, as the Court is divided, there cannot, of course, be any rule.

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CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN THE COURTS OF
KING'S BENCH AND COMMON PLEAS,
AT THE SITTINGS AFTER
MICHAELMAS TERM,
5 W. IV. 1834.

ADJOURNED SITTINGS IN KING'S BENCH.

PRUDHOMME v. FRASER.

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THIS was an action for a libel on the character of the plaintiff in his capacity of cook to *Earl Grey*. The libel was contained in an article inserted in a periodical publication called "*Fraser's Magazine*." The article was headed "Household Servants," and purported to contain strictures on the dishonesty and improper conduct of servants in general, in the families of the upper classes of society. The part referring to the misconduct of cooks did not occupy any considerable portion of the article in question; and that part of it referring to the plaintiff consisted merely of an anecdote as to his mode of purchasing charcoal for his master, and was confined to a very few lines.

Superfluous averments and innuendos in libel ought not to be struck out at the instance of the plaintiff, at Nisi Prius.

The declaration set out the whole of the article published in the magazine, introducing it by the

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usual allegation that the defendant published it of and concerning (amongst others) the plaintiff; and that innuendo was repeated throughout the libel, whenever imputations were conveyed by it against any class of servants. After the publication had been proved, and the libel read,

Sir *J. Campbell* A. G. applied to the Lord Chief Justice to amend the declaration under the new act (3 & 4 *W. 4. c. 42. s. 23.*) by striking out all the innuendos, excepting in the particular passage respecting the plaintiff, and contended that at all events his Lordship would make the amendment if the plaintiff agreed (as he offered to do) that not the innuendos only, but all those parts of the libel itself should be struck out of the declaration, which did not apply individually to the plaintiff.

Sir *J. Scarlett* and *Jeremy, contra*. Those who drew this declaration have chosen, with a view of creating a prejudice against the defendant, unnecessarily to include in the declaration matters having no possible reference to the plaintiff; and there is one general averment applicable to the whole supposed libel, viz. that it was published (the whole of it, and not merely the anecdote respecting the charcoal,) “of and concerning the plaintiff.” That allegation we come prepared to disprove, and thereby to nonsuit the plaintiff.

Lord DENMAN C. J. It is discretionary with the Judge to allow or to refuse amendments under this act of Parliament. In the present instance, I think,

in the exercise of my discretion, that the amendment should not be allowed. Matters have been introduced on this record (in my opinion, very improperly and awkwardly introduced) which ought never to have been put there. I will not, therefore, relieve the plaintiff, at this late hour, from the consequences of the course of pleading which he has chosen to pursue. The jury will say whether the innuendos are proved, and the defendant may then make such application to the Court above, as he may be advised.


Leave to amend was refused.

The jury gave a verdict for the plaintiff; damages 50*l.*, but they found that the innuendos were not proved, except so far as respected the passage concerning the charcoal. (*a*)

Sir *J. Campbell*, A. G. and *Thomas* for the plaintiff.

Sir *James Scarlett* and *Jeremy* for the defendant.

(*a*) See 2 *Adol. & Ellis*, p. 645., where this case is reported on another point.

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 ADJOURNED SITTINGS IN THE COMMON PLEAS.

 WESTMINSTER,
Dec. 8.

DESBROWE v. WETHERBY.

An alteration of a general acceptance of a bill, by the addition of a place of payment, discharges the acceptor, if made without his privity.

ASSUMPSIT.

Indorsee against the acceptor of a bill of exchange for 450*l.* The defence was, that the bill having been accepted by the defendant payable generally, the words “ payable at *Archibald* and Co. *Regent Street*,” had been added to the acceptance by some other party, without the defendant’s authority.

Wilde Serjt. contended that the alteration was in a material part and vitiated the bill. He relied upon *Macintosh* v. *Haydon*, R. & M. 362. It lay then on the plaintiff to shew that the alteration was made by the defendant’s authority. (*a*)

For the plaintiff it was answered, that since the statute 1 & 2 G. 4. c. 78., the addition of the words here supposed to have been unduly inserted was wholly immaterial. The addition of these words gave the acceptance no new character, nor did they in any degree qualify the defendant’s liability. (*b*)

TINDAL C. J. in summing up, asked the jury

(*a*) *Fayle* v. *Bird*, 6 R. & C. 531.

(*b*) See *Bishop* v. *Chambre*, M. & M. Rep. 116.; *Henman* v. *Dickinson*, 5 Bing. 183.


whether they were satisfied that the addition of the place where the bill was payable was made after it was accepted by the defendant? if it was, there was nothing to shew that the defendant authorized the alteration, and therefore, the alteration, being a material one, vitiated the acceptance : it materially altered the situation of the parties, inasmuch as the drawer and indorser would be made liable, as upon a default by the acceptor, if he failed to pay the bill at a place of which he might have no knowledge, and so no opportunity of providing funds there to meet the bill when at maturity ; the result of this would be, that the acceptor might be made liable to costs at the suit of these parties.

Verdict for the defendant.

Talfourd Serjt. and *Welsby* for the plaintiff.

Wilde Serjt. for the defendant. (a)

(a) The same point came before Lord *Lyndhurst* C. B. in the case of *Taylor v. Moseley*, tried at the *Middlesex* sittings after *Michaelmas* term, 1833, when his Lordship recognized the case of *Macintosh v. Haydon*, R. & M. N. P.C. 362.; and the plaintiff, suing on a bill altered in the same manner as the bill in the principal case, was nonsuited.— Although, therefore, there has not been any decision in Banco as to the materiality of an alteration of a bill of exchange, by adding a particular place of payment to the words of acceptance, without the acceptor's authority, since the statute 1 & 2 G. 4. c. 78. came into operation, the point perhaps may be considered as settled by the concurrent decisions of the two Lord Chief Justices and the Lord Chief Baron.— Where the alteration is made with the consent of the acceptor, it clearly does not vitiate the acceptance.— (See *Walter v. Cubley*, 2 C. & M. 151.)

1834.

 DEBBROWE
 v.
 WETHERBY.

1834.

 ADJOURNED SITTINGS IN LONDON.

 GUILDHALL,
 Dec. 12.
REEVE *v.* UNDERHILL and Others.

In covenant, the party on whom the affirmative of the issue lies, is entitled to begin, though the damages are unascertained.

COVENANT.

The deed declared upon, contained Covenants; First, that the defendants would assign a lease to the plaintiff; and, secondly, that they would also make over to him the fixtures upon the premises. Breaches, first, that the defendants would not assign the lease to the plaintiff. Secondly, that the defendants would not make over the fixtures to the plaintiff. Plea, that the deed was obtained by the plaintiff from the defendants by fraud and covin.

Replication, traversing that allegation, and issue thereon.

Atcherley Serjt. for the defendants, claimed the right to begin, the affirmative of the issue lying on them.

Wilde Serjt., *contra*. The plaintiff is entitled to begin under the rule recently adopted by the Judges. (a) It is true the affirmative of the issue is on the defendants; but the damages are here quite unliquidated. It is an action for breach of a special agreement: the amount of damages will depend on a variety of circumstances which the plaintiff has a right to lay before the jury.

(a) *Vide supra*, p. 281.

TINDAL C. J. It certainly was not meant that the new rule should extend to such cases as this : to be sure, it can hardly be said in any case where the action is for breach of a special agreement, that the damages are precisely ascertained ; but here the amount is, after all, matter of mere calculation, and not liable to be increased by any matter that the plaintiff can urge in aggravation : it is otherwise in actions of libel, slander, and other cases where the action is brought for *malicious* injuries. I think the defendants are in this case entitled to begin, the affirmative lying on them.

1834.

 REEVE
 v.
 UNDERHILL.

The defendants accordingly opened their case. (a)
 Verdict for the plaintiff.

Wilde Serjt. and *Barstow* for the plaintiff.
Atcherley Serjt. and *Busby* for the defendant.

(a) In *Absalom v. Beaumont* and others, tried at Westminster, February 8. 1837, which was an action on a policy of insurance against fire, there were four pleas, in all of which the affirmative was on the defendants. Lord *Denman* C. J., after argument in which *Carter v. Jones*, 6 Car. & P. 64. *suprà*, 281. and *Cooper v. Wakley*, M. & M. 248. were cited, ruled that “ in all cases where any affirmative issue, or, to speak more correctly, any affirmative proof, lay on the plaintiff to shew what damages he was entitled to, the plaintiff had a right to begin.” The plaintiff accordingly did begin, and after evidence had been given, the defendants submitted to a verdict upon terms.

It would seem that the resolution of the Judges mentioned in *Carter v. Jones* stopped short of what was wanted for the guidance of the profession.

1834.

 ADJOURNED SITTINGS IN THE EXCHEQUER.

 WESTMINSTER,
 Dec. 1.
MASH *v.* DENSHAM.

In case for
 fraudulent
 misrepresent-
 ation, an
 amendment of
 the misrepre-
 sentation
 charged may
 be made at
 Nisi Prius.

CASE for a fraudulent misrepresentation.

The declaration stated that the plaintiff was about purchasing a horse of *J. Maddox*, and that the said *J. M.* warranted the horse to be sound, and a good worker; that for the truth and corroboration of his statement he referred the plaintiff to the defendant, and that the defendant, in answer to the plaintiff's inquiries, warranted the horse to be sound, and a good worker, and knowingly, falsely, and fraudulently asserted and affirmed that the representation of *Maddox* was true. Breach, that the representation of *Maddox* was untrue, and that the horse was not sound nor a good worker.

Plea, not guilty.

The evidence was that the defendant, on being referred to by the plaintiff, said he warranted the horse *sound in the wind*.

Erle, for the defendant, objected that the warranty and misrepresentation alleged in the declaration were not proved.

ALDERSON B. I think the declaration is substantially proved, and therefore I shall direct the record to be amended under the recent act. (*a*)

(*a*) Stat. 3 & 4 Will. IV. c. 42. s. 23.

The variance relied upon by the defendant is not material to the merits. The merits are whether or no the defendant made a fraudulent misrepresentation? It is proved that he did: and though the terms of the misrepresentation are not quite accurately stated in the declaration, it is clear that the defendant cannot have been misled by the statement. If he had been, I would not amend. But he comes here to defend himself from the charge of having made a fraudulent misrepresentation on the occasion of this sale; and whether he represented the horse to be wholly sound or merely sound in the wind, makes no difference in the merits.

Verdict for the plaintiff. (a)

R. V. Richards and *Carrow* for the plaintiff.
Erle for the defendant.

(a) See *Hanbury v. Ella*, 1 Adol. & Ell. 61.

GILES v. SMITH.

WESTMINSTER,
Dec. 2.

TROVER.

The action was brought by the plaintiff, a bankrupt, against his assignee to try the validity of the fiat.

The fiat and assignment were said to have been lost, and in order to prove that proper search had been made for those documents, that secondary evidence of their contents might be let in, the de-

In trover by a bankrupt against his assignee, the official assignee is a competent witness for the defendant to sustain the bankruptcy.

1834.

GILES

v.

SMITH.

fendant called the official assignee who had in the usual way assigned over to the defendant.

Bompas Serjt. objected that the witness was incompetent, inasmuch as the result of the action for the plaintiff would be to defeat the bankruptcy, and deprive the assignee of the funds out of which the witness would be remunerated, under 1 & 2 *W. 4. c. 56. s. 57.*, whereby it is enacted, that "it shall be lawful for the commissioner before whom any person shall be adjudged a bankrupt in the said court of bankruptcy, or who shall appoint an official assignee under the power hereinbefore given for that purpose, to order and allow to be paid out of the bankrupt's estate to the official assignee thereof, as a remuneration for his services, such sum of money as shall appear to such commissioner, upon consideration of the amount of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable."

PARKE B. The objection only goes to his credit, because *non constat* that the commissioners will allow the official assignee any thing. In order to make a witness incompetent, the necessary and legal result must be some loss or gain.

The witness was admitted.

Verdict for the defendant. (a)

Bompas Serjt. and *Mansel*, for the plaintiff.
F. Pollock and *Bonsor*, for the defendants.

(a) See this case reported as to the admissibility of *any* secondary evidence of an unrecorded assignment, 1 *C. M. & R.* 462.

1834.

JACOB v. Sir W. HUNGATE.

GUILDHALL,
Dec. 19.

ASSUMPSIT by second indorsee against acceptor of a bill of Exchange, drawn upon him by one *Slade*, payable to the drawer's order.

Plea, That the defendant accepted the bill and delivered it to the drawer for the purpose only of his getting it discounted, and paying the proceeds over to the defendant for his (the defendant's) own use; that the drawer had never paid him over such proceeds, nor had he, the defendant, received any consideration or value for the said bill, or any part thereof; that the drawer without any consideration indorsed the bill to one *Mary Hughes*, who also, without consideration, indorsed it to plaintiff, and that neither she nor the plaintiff during all the time aforesaid gave any value for said bill, and that they respectively, during the time aforesaid, had notice of all the matters hereinbefore mentioned.

The fact of a bill having been accepted to raise money for the acceptor, and of the payee having appropriated the money so raised to his own use, is not sufficient to call upon a subsequent indorsee to shew that he gave value for the bill.

Replication, That the plaintiff gave full value for the bill; and that said *Mary Hughes* did not indorse it to plaintiff without consideration; and that the plaintiff had not such notice as in the plea mentioned and issue thereon.

Bompas Serjt. for the plaintiff, contended that on these pleadings he was not under the necessity of calling witnesses to shew that he gave value for the bill; the possession of the bill, under an in-

1834.

JACOB

v.

HUNGATE.

dorsement, was itself sufficient evidence of consideration.

Humfrey, contra. The plaintiff has only traversed two averments in the plea: 1st, that he took the bill from *Mary Hughes* without consideration; 2dly, that he had notice of the original want of consideration: the other averments are not traversed. It stands, therefore, admitted on record that the drawer originally appropriated the bill to his own use, in fraud of the acceptor, who was to have had the proceeds, and also that he indorsed the bill to *Mary Hughes* without consideration. Now these facts (which are virtually admitted by the pleadings) are sufficient to give a taint to the holder's title to the bill, and would under the old practice of the Courts be sufficient to cast on him the burthen of proving that *he* gave value for it, *Thomas v. Newton* (a), and the new rules were not intended to shift the burthen of proof from one party to another.

Bompas Serjt. in reply. The new rules of pleading have thrown this difficulty on the plaintiff. If the matter of defence had arisen under the old system, the defendant would under the general issue have had to prove all the matters alleged in his plea, and he should be equally bound to prove them now. He also disputed the correctness of the decision in *Thomas v. Newton*; and as to the suggestion of *fraud*, he said that there was no allegation of fraud on the face of the plea.

(a) 2 C. & P. 606.

PARKE B. (after looking through the pleadings) said, I do not think there is any such allegation of *fraud* on the part of the payee, as makes it necessary on that ground for the holder to prove consideration. In effect it only comes to this, that the payee, *Slade*, received the bill for the purpose of paying the proceeds to the defendant, and has failed to do so: it is not averred there was any fraud in the transaction. Then if the case is put simply on the want of consideration, the correctness of the decision in *Thomas v. Newton* upon that point has been much questioned. I have myself heard Lord *Tenterden* rule differently. There was a subsequent case of *Heath v. Sansom* (a), where some of the Judges were of opinion that where the original payee had not given value for the bill, the indorsee must prove that value had been given for it by himself, or by some prior indorsee, but I thought then that the rule should not go that length. I could not see that the circumstance of the bill having been originally accepted for the accommodation of the drawer, ought to throw upon the holder the burthen of proving the consideration which he gave for the bill. I retain that opinion still; and I know that several of the Judges who were not of my opinion at that time, have since, on reconsideration, been disposed to concur in it. (b) I am therefore of opinion that there is not enough in these pleadings to call on the plaintiff to prove value.

1834.
JACOB
v.
HUNGATE.

(a) 2 B. & Adol. 291.

(b) See *Whittaker v. Edmunds*, *supra*, p. 366.

1834.

JACOB
v.
HUNGATE.

The defendant accordingly went into his case and endeavoured to support his plea ; but there was a

Verdict for the plaintiff. (a)

Bompas Serjt. and *Steer* for the plaintiff.
Humfrey and *Mansel* for the defendant.

(a) See *Mills v. Barber*, 1 Mees. & W. 425. It seems now to be settled, that the circumstance of the bill having been accepted without value received by the acceptor, is not sufficient to cast upon the holder the onus of proving the consideration which he gave for the bill ; on the other hand, if the bill was obtained from the acceptor, or some party between him and the holder, *fraudulently*, this throws such a taint on the bill as to make it necessary for the holder to prove consideration. The principal case may perhaps be considered of a mixed nature ; there being something more than a mere defect of consideration between the original parties to the bill, inasmuch as it was alleged in the plea, not that the bill was accepted for the accommodation of the drawer, but that he had appropriated the proceeds of it to his own use, *in breach of the contract between him and the acceptor* ; still, there was no allegation of fraud in the transaction.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B., C. P., AND EXCHEQUER,

AT THE SITTINGS AFTER

HILARY TERM,

5 W. IV. 1835.

ADJOURNED SITTINGS IN KING'S BENCH.

WATTS *v.* FRASER and Another.

1835.


WESTMINSTER,
Feb. 3.

CASE for a libel published in a publication called
“*Fraser's Magazine.*”

Pleas — general issue, and a justification of the
truth of the libel.

For the defendants, evidence was offered that the
plaintiff had published libels against the defendants
shortly before the publication complained of in the
declaration, and it was contended they had a right
to offer this evidence in mitigation of damages.

In an action
for libel, pre-
vious libels of
the plaintiff,
shewn to be
the provoca-
tion of that
charged, are
admissible in
mitigation of
damages.

For the plaintiff it was answered that such evi-
dence was not admissible. If the defendants were
permitted to give evidence of the libels alleged to
have been published by the plaintiff, on the ground
that they were the provocation which led to the
libel complained of in this action ; the plaintiff

1835.

WATTS
v.
FRASER
and
ANOTHER.

should be allowed to give evidence either of the truth of the libels which *he* had published, or to shew that the defendants had commenced the attack by other yet earlier libels, prior in date to the first of the plaintiff's libels; either of these courses would be open to very great inconvenience, and it was submitted that the only correct course was, to leave the defendant to bring his cross-action for any ground of complaint which he might have against the plaintiff, and *May v. Brown (a)* was cited.

Lord DENMAN C. J. Undoubtedly there is great difficulty in applying a proper principle to cases of this sort. I cannot give effect to the evidence now tendered for the defendants, as affording a defence in the nature of a set-off; but on the other hand, I do not see how I can wholly exclude from the consideration of the jury other libels published by the plaintiff, forming, as it is alleged, the provocation by which the defendants were goaded by the plaintiff himself to do the act for which he now claims redress: the jury will say how far the libels are thus connected together; if they be, such evidence tends to shew that the plaintiff is in some measure the cause of the injury he complains of. It follows certainly, that if this evidence be received, the plaintiff must be allowed to give evidence to shew that the defendants commenced the attack, by proof of other previous libels published against him by the defendants. I do not wish to give any opinion which should have the effect of

(a) 3 B. & C. 113.


overruling *May v. Brown*, but I have read that case, and still think I am bound to receive this evidence.

The evidence was received accordingly.

Verdict for plaintiff. (a)

Sir *J. Campbell*, and *Barstow* for the plaintiff.

Erle and *Tyndale*, for the defendant.

1835.

 WATTS
 v.
 FRASER
 and
 ANOTHER.

(a) The same question came before the Ld. C. J. at the Spring Assizes of 1836, for the county of York, in the case of *Moore v. Oastler*. That was an action for a libel, to which the defendant pleaded the general issue, and a justification as to part, alleging facts which shewed that part of the libel to be true.

The defendant offered evidence that the plaintiff had been in the habit of defaming the defendant, and had done so very recently before the defendant published the libel in question.

Blackburne and *Wightman*, for the plaintiff, objected that such evidence was not admissible; Lord *Denman* C. J. allowed it however, to be given, saying, — “It is undoubtedly settled that a defendant cannot justify, or even excuse, the publication of slander by merely shewing that the plaintiff had himself been guilty of similar misconduct towards him, the defendant. The doctrine laid down by Lord *Kenyon* in *Anthony Pasquin’s* case (b), has been long disapproved of by the profession; but where the defamatory matter alleged to have been published by the plaintiff has been spoken at such time and under such circumstances, as to raise the fair presumption that the defendant’s defamation may have been provoked by the plaintiff’s, I certainly think the evidence should not be excluded. In *May v. Brown* (c). Ld. C. J. *Abbott* grounded his rejection of the evidence upon the fact that there was there nothing to connect the slander spoken by the defendant with that alleged to have been spoken by the plaintiff, or to shew that the one had been provoked by the other. Here there is evidence to that effect.”

The evidence was accordingly received.

Verdict for plaintiff, damages one farthing.

Blackburne, *Wightman*, and *Hoggins*, for the plaintiff.

The defendant in person.

(b) Cited in *Tabart v. Tipper*, 1 Campb. 351.

(c) 3 B. & C. 113.

1835.

 ADJOURNED SITTINGS IN THE COMMON PLEAS.

 GUILDHALL,
 Feb. 21.

 SWAIN and Others, Assignees of STRINGER a
 Bankrupt, v. ROBERTS.

A defendant who has not complied with a judge's order to deliver particulars of set off *with dates*, will not be allowed to give any evidence of his set-off. Particulars delivered in which the only dates were "from January 1828 to January 1834," are not a compliance with such an order.

ASSUMPSIT on several promissory notes, made by the defendant, and payable to the bankrupt before his bankruptcy. There were also the usual counts for goods sold and the money counts.

Plea, as to the counts on the promissory notes, want of consideration, and issue thereon. As to the other counts, set off for 1500*l.* in respect of work and labour done and performed by the defendant, as the attorney and solicitor of and for the bankrupt before his bankruptcy, in and about the prosecuting and defending divers suits at law and equity for the bankrupt, and for fees &c. and in and about drawing deeds &c., and for journies, and for money paid &c.

Replication *non indebitatus*, &c.

Upon the defendant's offering to prove his set off,

Wilde Serjt., for the plaintiffs, objected that it was not competent to the defendant to do so. On the 8th of August, the plaintiffs having taken out a summons for a particular of the set off, one of the learned Judges made an order "that the defendant should within a month *peremptorily* deliver to the plaintiffs attorney or agent, on account in writing, *with*

dates, of the particulars of the set off, and in default thereof, that he be precluded from giving evidence in support of such set off on the trial." The only particular delivered in obedience to this order was in the following form : —

"From *January* 1828, to *January* 1834. To work and labour, care and diligence, of the defendant by him done, performed, and bestowed, for the bankrupt, as an attorney and solicitor of the bankrupt, in and about the prosecuting and defending divers suits at law and equity for the bankrupt, and for fees due and of right payable, in reference thereunto, and in and about the drawing, copying, and engrossing divers deeds and writings for the bankrupt, and for divers journies and attendances taken, made, and performed, in and about the said work.


"To money paid, &c.


"To money lent and advanced.

"To money due on an account stated. 1500*l*.

This was a mere evasion of the Judge's order : there was indeed a pretended giving of *dates*, but such a one as could not possibly give the plaintiffs the information they wanted ; and there was not even a pretence of specifying the amount of the different items of set off.

Bompas Serjt., for the defendant. The particular does specify *dates*, as the order required it should ; and if the plaintiffs did not find it sufficient for their purposes, they ought to have applied for a better particular.

1835.

 SWAIN
 and OTHERS
 v.
 ROBERTS.

1835.

 SWAIN
 and OTHERS
 v.
 ROBERTS.

TINDAL C. J. It is obvious that this is a mere colourable compliance with the learned Judge's order. I shall not, therefore, permit the defendant to go into evidence of his set off.

The defendant was accordingly precluded from giving evidence of his set off.

Verdict for the plaintiffs.

Wilde Serjt. and *Butt*, for the plaintiffs.
Bompas Serjt., for the defendant.

ADJOURNED SITTINGS IN THE EXCHEQUER.

WESTMINSTER,
 Feb. 11.

MOSCATTI v. LAWSON.

When a party conducts his own case and examines his own witnesses' counsel are not allowed to argue points of law for him.

THIS was an action for a libel published by the defendant in the *Times* newspaper.

The plaintiff conducted his case in person, and examined his witnesses, but *Butt* had a brief in the cause, ostensibly to take notes, and argue any point of law which might arise.

A question arising as to the admissibility in evidence of a certain letter written by the plaintiff, *Butt* rose to oppose the admission, when

ALDERSON B. interposed, saying:—I do not think that I ought to hear you at all. Either a barrister is retained in a cause, or he is not; if he is retained in it, he ought to be in his proper place—at the head of it, and to conduct it throughout.

The institution of barristers is principally to assist the Court in the dispensing of justice : and the present is one among many instances which shew, that if parties persist in conducting their own causes, no time and no strength would be sufficient to get through the business of the country.

I am aware that there are many precedents to bear out the learned counsel in consenting to stand in his present position, but at the same time I think it a very objectionable practice.

The letter was rejected by the learned Baron without hearing *Butt* on the part of the plaintiff.

A juror was ultimately withdrawn.

Plaintiff in person.

Sir *J. Campbell*, *Platt*, and *Humphrey*, for the defendants.

1835.

 MOSCATTI
 v.
 LAWSON.

PEARCE v. ORNSBY.

WESTMINSTER,
 Feb. 13.

SLANDER.

The words in the declaration charged the plaintiff with keeping a bawdy-house &c.

The words were proved, and *Thesiger* for the plaintiff offered to prove that after this action the defendant had repeated the same actionable words. *Cresswell* for the defendant objected, and cited *Roscoe* on Evidence, p. 116. (a)

In slander where the words proved are unambiguous, subsequent words of the same import are inadmissible.

(a) 373. 4th Edition.

1835.

PEARCE

v.

ORNSBY.

Thesiger relied on *Plunkett v. Cobbett*, 5 Esp. 136.

LORD ABINGER C. B. The distinction is this, that you may give evidence of subsequent words, to explain the words in the declaration; but when there is nothing equivocal in the words charged, you cannot give evidence of subsequent words of the same import, for which subsequent words another action may be brought and damages recovered; inasmuch as the record in this action would be no bar to the subsequent action for the same words, though the evidence now offered would tend to aggravate the damages in this. In the case cited of *Plunkett v. Cobbett*, the other papers were offered for another purpose, and Lord *Ellenborough* told the jury not to increase their damages by the consideration of their contents as libels.

The evidence was rejected.

Verdict for the Plaintiff. (a)

Thesiger, *Adolphus*, and *Mansel*, for the plaintiff.
Cresswell, *Clarkson*, and *Crompton*, for the defendant.

(a) See *Symmons v. Blake*, *infra*, 477.

DEROSNE *v.* FAIRLIE.

WESTMINSTER,
Feb. 14.

CASE for the infringement of a patent for improvements in extracting and refining sugar.

Pleas, 1st, not guilty; 2dly, that the invention was not new; 3dly, no sufficient specification &c.

For the plaintiff, a witness was called who on the *voire dire*, stated he had purchased a licence to use the patent from the plaintiff.

In case for the infringement of a patent a purchaser of a licence to use the patent is a competent witness for the plaintiff.

Crowder, on the part of the defendant, objected to the competency of the witness, inasmuch as by a verdict for the defendant, he would be deprived of his share in the monopoly, which he held under the plaintiff.

Sir J. Campbell. This verdict would not affect, and could not be given in evidence against, the witness. The patent may be still good, though this verdict were against the plaintiff.

Lord ABINGER C. B. The witness might possibly be even benefited by the destruction of the patent. But at all events the witness would not be affected by this verdict. In any controversy that arose between him and the plaintiff, it is obvious that the witness could not be benefited by shewing that the verdict in this case passed against the defendant: — and as to any other controversy, no action at all could be maintained against the

1835.

DEROSNE
v.
FAIRLIE.

witness, and he could maintain no action against any one else for the use of the invention, inasmuch as he has a mere licence.

The witness was examined for the plaintiff.

Verdict for the plaintiff. (a)

Sir *J. Campbell, Ludlow, Serjt. and Godson*, for the plaintiff.

Sir *F. Pollock A. G. and Crowder*, for the defendant.

(a) This case was moved on other points, but the point reported was not mentioned.

WESTMINSTER,
Feb. 15.

BURKHARDT v. ANGERSTEIN.

Where the issue is whether goods sold to an infant were necessaries, evidence is admissible to shew that the infant, at the time of the sale, was already supplied with a sufficient quantity of that description of goods.

ASSUMPSIT to recover the balance of a tailor's bill.

Plea as to part, payment before action: as to other part, infancy.

Replication to the plea of infancy, that the goods were necessaries.

The plaintiff was a tailor carrying on business in St. James's Street, who had supplied the defendant (at that time a cornet in the life guards) with large quantities of wearing apparel, amounting in the space of fifteen months to several hundred pounds.

Sir *W. Follett*, for the defendant, offered evidence to prove that within the time comprised in the plaintiff's particular of demand, the defendant's

father had paid several tailors' bills for him. He relied on *Ford v. Fothergill*. (a)

1835.

BURKHARDT
v.
ANGERSTEIN.

Erle, for the plaintiff, objected that this was not evidence. If the goods supplied were such as were, generally speaking, necessary for a young man in the defendant's rank of life, the tradesmen were entitled to consider them necessary for the defendant; it was no answer that the defendant may perhaps have been supplied with similar articles by other tailors, of which (of course) the plaintiff could have no knowledge.

ALDERSON B. said he should receive the evidence. In deciding whether the goods bought of the plaintiff were necessary for the defendant, it is of course material to ascertain to what extent the latter had already been supplied with the same kind of goods, at or recently before the time when the plaintiff supplied *his* articles.

The evidence was accordingly given.

Verdict for the defendant.

Erle and *Jardine*, for the plaintiff.

Sir *W. Follett*, S. G. *Bere*, and *Ball*, for the defendant.

(a) 1 Esp. R. 211.

1885.

GUILDHALL,
Feb. 25.MASON and Another, Executors &c. v. DITCH-
BOURNE and SARSON.

On a plea that a bond was obtained by fraud and covin evidence is not admissible to show that the defendant executed it with full knowledge of its contents, but in consequence of previous fraud.

THIS was an action upon a bond given to secure the payment by instalments of a sum of money agreed to be paid by defendants, (who were attorneys in partnership together,) for the business of the testator of the plaintiffs, who had also been an attorney.

Pleas. 1st, *Non est factum*.

2dly. That the bond was obtained by the fraud and covin of the plaintiff's testator.


Issue thereon.

The execution of the bond by the defendants having been proved,

Platt, for one of the defendants, proposed to shew that the bond had been obtained from the defendants by a fraudulent misrepresentation of the extent and nature of the business which they were contracting to buy of the testator; but it was proved by the witness who proved the execution of the bond, that both the defendants were fully acquainted with the contents of the bond, and that in fact it had been prepared by one of them.

Lord ABINGER C. B. My opinion is, that the defence which you rely upon, is not open to you on this record. The old books tell us that the

plea of fraud and covin is a kind of special *non est factum*, and it ends “and so the defendant says it is not his deed.” Such a plea would, I admit, let in evidence of any fraud in the execution of the instrument declared upon : as if its contents were misread, or a different deed were substituted for that which the party intended to execute. You may perhaps be relieved in equity, but in a court of law it has always been my opinion that such a defence is unavailing, when once it is shewn that the party knew perfectly well the nature of the deed which he was executing.

1835.

 MASON
 and Another
 v.
 DITCHBOURNE
 and SARSON.

Platt. There was a case of *D'Aranda v. Houston* tried in this Court, July 10. 1834, where the plea was the same as here, and evidence was gone into on behalf of the defendants, of the same nature as we offer : there was, however, a verdict for the plaintiff, as the Jury thought the case was not proved.

LORD ABINGER. I am aware that there have been cases in which it has been done, but my own opinion being decidedly against the admissibility of such a defence under this plea, I will not consume the time of the Court in trying it.

The evidence was rejected, and there was consequently a

Verdict for the plaintiffs.

Thesiger and *Miller*, for the plaintiffs.

Erle and *Ryland*, for *Ditchbourne*.

Platt and *Humfrey*, for *Sarson*.

1835.

MASON
and Another
v.
DITCHBOURNE
and SARSON.

Only one
counsel can be
allowed to ad-
dress the jury
for several de-
fendants rely-
ing on the
same defence.

In *Easter* Term, 1835, the Defendant moved the Court for a new trial, on the ground that the evidence of fraud had been improperly rejected. The Court made the rule for a new trial absolute, in order that the question as to the admissibility of such evidence might be more distinctly raised. 2 C. M. & R. 720. a.

The case was accordingly tried again at the sittings after *Michaelmas* Term, 1835, when the evidence was received, but the Plaintiffs had a verdict.

On this occasion, *Platt* having been heard for the Defendant *Sarson*, *Erle* rose to address the jury for the Defendant *Ditchbourne*, when Lord ABINGER interposed, saying the rule was, that where two defendants relied upon precisely the same ground of defence, only one counsel could address the jury, for there could not be a verdict for one defendant and against the other — if the bond were void against one it was void against both.

SPRING ASSIZES, 5 W. IV.

DURHAM.

Coram PARKE B.

DURHAM,
March 2.

MOORE v. DENT.

In an action
on an at-
torney's bill
non-delivery
of the bill
must be plead-
ed, or the
plaintiff need
not prove the
delivery.

ASSUMPSIT to recover the amount of an attorney's bill of costs.

Pleas, as to 11*l.*, payment — as to the residue, *non assumpsit*.

Watson, for the plaintiff, after proving the work done, proposed to call a witness to prove the delivery of the bill of costs under the statute, but

PARKE B. said it is quite unnecessary for you to

call the witness. Under the new rules the defendant should have pleaded the non-delivery of the bill of costs, if he meant to take that objection.

The witness was not called.

Verdict for the plaintiff. (a)

W. H. Watson, for the plaintiff.

Alexandar, for the defendant.

1835.

MOORE

v.

DENT.

(a) In *Beck v. Mordant*, 2 Bingham N. C. 140., it seems to have been taken for granted (though the point was not expressly raised) that in an action brought upon an attorney's bill, the defendant cannot rely on the non-delivery of the bill unless he has pleaded that defence specially.

REX v. LUCY BERRY.

LANCASTER,
March 17.

INDICTMENT for manslaughter. The indictment did not conclude *contra formam statuti*.

The prisoner having been found guilty,

Peel objected on her behalf, that the Court could not pronounce the statutable punishment against her, inasmuch as the indictment did not allege the offence to have been committed *contra form. stat.*, and he cited *Starkie's Treatise on Crim. Pleading*, p. 229.

On a conviction of manslaughter on an indictment for murder not concluding *contra formam statuti*, punishment may be inflicted under 9 G. 4. c. 31. s. 9.

PARKE B. The objection is of no avail. Eleven of the fifteen Judges have recently decided the

1835.

REX

v.

LUCY BERRY.

point in *Rex v. Chatburn (a)*; that was an indictment for murder: the prisoner was convicted of manslaughter only, and it was held that the Court might pass the statutable sentence on him, although there was of course no averment that the offence was committed *contra formam statuti*. That conclusion is only necessary when a statute creates the offence, not when it merely regulates the punishment.

Brandt, for the prosecutor.

Peel, for the prisoner.

(a) See *Moody's C. C. R.* 403.

Coram ALDERSON B.

LANCASTER,
March 20.

AMOS *v.* HUGHES.

In assumpsit for unworkmanlike execution of a contract, plea, that the work was properly done, the plaintiff is entitled to begin.

ASSUMPSIT for a breach of a contract to emboss calico in a workmanlike manner.

Breach, That the defendant did not emboss the calico in a workmanlike manner, but on the contrary, embossed it in a bad and unworkmanlike manner.

Plea, That the defendant did emboss the calico in a workmanlike manner, and issue thereon.

A question arising, which party was entitled to begin,

ALDERSON B. ruled, that the plaintiff was entitled. He said, questions of this kind were not to be decided by simply ascertaining on which side

the affirmative, in point of form, lay: the proper test is, which party would be successful if no evidence at all were given? Now here, supposing no evidence to be given on either side, the defendant would be entitled to the verdict, for it is not to be assumed that the work was badly executed; therefore the onus lies on the plaintiff.

The plaintiff accordingly began. (*a*)

Verdict for the plaintiff.

Alexander and Tomlinson, for the plaintiff.

Atcherley Serjt. and W. H. Watson, for the defendant.

1835.

AMOS
v.
HUGHES.

(*a*) In *Mills v. Barber*, 1 Mees. & Wels. 427., the learned baron observed, "upon the question as to who is to begin, is it not the proper test to examine whether, if the particular allegation be struck out of the plea, there will or will not be a defence to the action? It is immaterial whether the allegation be in the affirmative or negative." Undoubtedly, the test applied in the principal case, and which is substantially the same as that suggested in the passage just quoted, seems far more consistent with good sense, than leaving the matter to be decided by the question, which party, in point of form, has the affirmative cast upon him: a point, which is quite as often regulated by the dexterity of the pleaders, as by the real nature of the controversy between the parties. In the principal case the plaintiff admitted, by the form of his breach, that the defendant had *performed* the work contracted to be done, but he alleged that it had been performed in an unworkmanlike manner: therefore (for the reason assigned by the learned Judge) it was incumbent on the plaintiff to prove that allegation: had the plaintiff imprudently denied the defendant's performance of the work *generally*, the onus of proof (and with it, of course, the right to begin) would have been shifted on the defendant: for (to apply the learned Judge's test) if no evidence were given of the defendant's performance of the work, in any way — the plaintiff would succeed.

1835.

LANCASTER,
March 21.

DOE dem WILD v. ORMEROD.

EJECTMENT.

The probate of a will is not admissible to prove declarations of the testator as reputation in a question of pedigree.

For the defendant it became necessary to establish a descent from a particular ancestor ; and for this purpose,

Atcherley Serjt. offered in evidence the probate of a will made by a deceased member of the family, in which he spoke of certain persons as his relations.

Cresswell, for the plaintiff, objected to the receipt of this evidence. The probate of a will cannot be evidence in a case where (as in this) real property is in question. The original will should be produced ; but the evidence offered is not even equivalent to an examined copy. *Starkie* on Evidence, 108. *Polhill v. Polhill*, Bac. Ab. Evidence, W. (9) ; but there is moreover an express opinion of Mr. *J. Buller* that the probate is not receivable in evidence, even to prove relationship in a question of pedigree, *Bull. N. P.* 246.

For the defendants it was answered, that the probate was not tendered to prove the fact of any devise of the land, but merely as evidence of a declaration by the testator.

ALDERSON B., however, rejected the evidence, saying the authority cited appeared to be exactly in point, and he should therefore act upon it, although he was not altogether satisfied with the principle of it.

1835.
Doe dem.
WILD
v.
ORMEROD.

The evidence was rejected.

Verdict for defendant.

Cresswell and *Tomlinson* for the plaintiff.

Atcherley Serjt. and *Wightman* for the defendant.

REX v. ORRELL.

LANCASTER,
Mar. 24.

THE prisoner was indicted for the murder of his infant daughter by administering poison to her.

In opening the case for the prosecution in felony, counsel ought to state declarations proposed to be proved, as well as facts.

Brandt, in stating the case for the prosecution, after detailing the facts which he proposed to prove, said that he had another head of evidence, consisting of conversations with the prisoner and declarations by him, which, however, he thought it more fair to the prisoner not to state in the first instance.

PARKE B. Why not? I have never been able to understand why the whole case should not be stated to the jury, declarations as well as facts.

Brandt submitted that the general practice had been to omit in the opening statement all detail of expressions supposed to have been used by the prisoner, on the ground that a prejudice might be

1835.

REX

v.

ORRELL.

created against him by such expressions, and yet in the result it might turn out that the prisoner had never used them.

PARKE B. I think that in such a case the prisoner would sustain no injury, but the contrary, when it was found that the statement of the counsel was unsupported by the evidence. However, I will consult my Brother *Alderson* upon the subject.

His Lordship, having conferred with Mr. Baron *Alderson*, said that that learned Judge agreed in the opinion already expressed by himself, namely, that the fair and proper course was to state in the opening all that it was intended to prove.

Brandt then proceeded to detail a conversation in which the prisoner had expressed an intention to kill his child.

Brandt and *Trafford* for the prosecution.
The prisoner had no counsel.

YORK.

Coram PARKE B.

YORK,
March 30.

PICKLES v. HOLLINGS and Another.

A witness who may be liable to the costs of the action as special damages, may be made competent by in-

THIS was an action on the case against the defendants, as owners of a coach, for running over a filley of the plaintiff's through the negligent driving of their servant.

dorsement on the record pursuant to stat. 3 and 4 W. 4. c. 42. s. 26, 27.

For the defendants, the man who drove the coach at the time was called to prove that the accident arose in consequence of the filley starting at the coach as it passed, and that the person leading the filley ought not to have brought it so near the coach.

1835.
PICKLES
v.
HOLLINGS
and
ANOTHER.

Blackburne, for the plaintiff, objected to the witness as incompetent, unless he were released.

PARKE B. In my opinion, it is not necessary to have any release; the verdict, it is true, might be given in evidence against the witness to prove the amount of damages, in case an action be hereafter brought by the defendant against him; that is the only ground of objection which can be relied upon as making the witness incompetent; and as to that objection, it may be removed under the late statute by making an indorsement on the record. My own opinion therefore, is, that a release is not necessary; if the defendant think it safe to avoid all question by giving a release, he may; but I shall receive the evidence, if tendered, without one.

A release could not conveniently be given, and the witness was examined without one, his name being indorsed on the record.

Verdict for plaintiff. (a)

Blackburne and *Starkie* for the plaintiff.

Knowles for the defendant.

(a) See *Creevy v. Bowman*, *infra*, p. 496.

1835.

*April 1.*SPENCER *v.* AMERTON.

Charges made by a rate-payer against the constable of a district, to a meeting of rate-payers met to investigate the constable's disposal of the money of the inhabitants, are privileged, and may be made by letter, if the rate-payer be prevented from attending. The party alleging such letter to be libellous must prove the absence of the rate-payer to have been wilful.

THIS was an action for libel on the character of the plaintiff, as a township constable.

Pleas, 1st, General issue.

2dly, Pleas of justification.

It appeared in evidence that complaints had existed in the township respecting certain proceedings of the plaintiff whilst constable, and that, in particular, a complaint had been made as to a sum of money received by him some years before, and which he was alleged not duly to have accounted for: that a meeting of the rate payers for the township had been called for general purposes; that the defendant, who was an inhabitant and rate payer in the township, did not attend it, but wrote and sent the letter complained of as a libel, which was addressed to the meeting, and in which letter (after complaining of the plaintiff's extravagant expenses in his office) the defendant required that the plaintiff should be called upon, either by action or indictment, to account for the sum of money before referred to. The letter was opened and publicly read at the meeting by the chairman, in the presence and hearing of the persons there assembled.

The defendant's counsel abandoned the justification, but contended that he was entitled to a verdict on the general issue, on the ground that the letter complained of was a privileged communication made by a party interested, to other parties

equally interested, with a view to steps being taken for their common benefit.

For the plaintiff it was answered, that even admitting that such a statement as that complained of might have been privileged, if made by the defendant personally at the meeting, he had no right to send it in the form of a letter; that a party claiming a privilege of this nature was bound to use it in the form least injurious to the person whose character was at stake; and that here the defendant had pursued a different course, for defamatory matter, written or printed, was of a more injurious tendency to the party defamed than mere verbal slander, and was so considered in the eye of the law. The defendant had, nevertheless, not taken the trouble of attending the meeting, and there stating his sentiments, but had unnecessarily chosen to express his opinion of the plaintiff in a more durable and injurious form, without shewing any excusable ground for so doing.

1835.
SPENCER
v.
AMERTON.

PARKE B. (in his address to the jury) said, there is no doubt this is a communication which, if made *bonâ fide*, the defendant, as a party interested, might have made at the meeting by word of mouth; and it seems to me equally clear, that if he had any sufficient reason for being absent, he might well send in writing what he could not come to say verbally. There is here no evidence on either side whether the defendant was, or was not, necessarily absent; but the communication being made by a party interested, must be held to be *primâ facie* privileged, and therefore I think it was at all events incumbent upon the plaintiff to give evi-

1835.

SPENCER
v.
AMERTON.

dence to shew that the defendant's absence was wilful; without that evidence, the point taken on behalf of the plaintiff does not, in my opinion, arise. In the absence of that evidence, can you come to the conclusion that the defendant was actuated by a malicious motive? If not, the occasion justifies him, and you must acquit.

Verdict for defendant.

Alexander and *Tomlinson* for the plaintiff.
Blackburne and *Starkie* for the defendant.

April 6.

STEWART and Another v. BARNES.

A witness interested in the result of a suit an equity, is not made competent on an issue directed in such suit, by 3 and 4 W. 4. c. 42. ss. 26, 27.

On an issue to try the validity of a modus within a certain district in occupier of lands within the district is incompetent to prove such modus.

THIS was an issue directed by the Court of Exchequer (Equity side), to try whether from time immemorial certain lands in the possession of the plaintiffs formed part of a district of the hospital of *St. Nicholas Richmond*, and whether from time immemorial a certain modus had been payable in lieu of the tithes for that district.

For the plaintiffs (who had to establish the modus), a witness was called, who on the *voir dire* described himself as the occupier of lands within the district in question, whereupon it was objected for the defendant, that he was an incompetent witness.

Alexander for the plaintiffs, relied upon the act 3 & 4 W. 4. c. 42. s. 26 & 27., as removing the objection.

For the defendants it was answered, 1st, That the statute did not apply at all to a case where an issue was directed by a Court of Equity; here a decree might be made, of which the party might hereafter avail himself. 2ndly, That the objection was that the witness was interested, not merely in the record, but in the fact; for the destruction of the modus by the decree of the Court of Equity would be followed by payment of tithe in kind, by which the witness would be prejudiced and prevented from setting up the modus.

1835.
STEWART
and
ANOTHER
v.
BARNES.

ALDERSON B. The act of parliament only removes the objection where the witness is incompetent "on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him." Here, it is not a verdict or judgment which would be used in evidence for the witness. It is the decree of a Court of Equity which might be so used. Neither is this an action, but an issue. I think the statute does not apply; and I have spoken to the other Judges of the Court of Exchequer, and they are of the same opinion. I am also inclined to think that the second objection is a valid one, the witness having a direct interest in procuring the modus to be established.

The witness was rejected.

Verdict for the defendant.

Alexander, Wightman, and J. Dundas for the plaintiffs.

Cresswell, Starkie, and D. Dundas for the defendant.

1835.

April 8.

DYSON v. WARRIS and Another.

When a record is taken down to trial without any issue having been joined by the addition of the *similiter*, the defect may be cured by adding the *similiter* at the trial. If the jury have been sworn before the defect is found out, they should be resworn after the *similiter* has been added.

ASSUMPSIT on a promissory note.

There were special pleas; and replications which tendered issue on those pleas. After the jury had been sworn, and *Cresswell* had opened the case for the defendant, (the affirmative being supposed to lie on him,)

PARKE B. observed, that the record was defective, there being no *similiter* added by the defendants, though to one of the replications an “&c.” was added. *His Lordship* said that probably the “&c.” might be equivalent to the *similiter* to that one replication, but as to the other the jury had no issue to try.

The parties thereupon expressed a willingness to let the *similiter* be inserted now; but

PARKE B. observed that there still might be a difficulty: for instance, it would be difficult to assign perjury against any of the witnesses, inasmuch as the evidence would be given on the trial of an issue which was not joined between the parties at the time the jury were sworn,—an issue therefore which the jury were not sworn to try. The proper course of proceeding would be to let the amendment be made, and then have the jury resworn.

This was accordingly done, and the trial proceeded (a).

1835.

DYSON

v.

WARRIS
and
ANOTHER.

(a) In *Sayer v. Pocock*, Cowp. 407., where the *similiter* had not been added, the Court, after verdict, allowed the plaintiff to amend the record by inserting the *similiter* instead of the “&c.,” Lord *Mansfield* saying, “that he would adopt the reasoning of Lord *Coke*, and construe ‘&c.’ to mean every necessary matter that ought to be expressed,” Co. Lit. 17. b. And the Court of Common Pleas in a recent case, where the “&c.” had been added after the tender of issue, adopted the same course. *Reeder v. Bloom*, 2 Bing. 384.

It is presumed at the present day the Court would be disposed, in furtherance of justice, to allow the *similiter* to be added after verdict, even where no “&c.” has been inserted in the record, though some doubt seems to exist upon the point; for while the Court of King’s Bench, on the one hand, appears to have allowed the amendment, even in a penal action (*Wright qui tam v. Horton*, 1 Starkie N. P. C. 400), the Court of Common Pleas, on the other hand, in a more recent case, set aside the verdict for irregularity, the successful party having taken the record down to trial without adding any *similiter* (*Griffith v. Crockford*, 3 Brod. & B. p. 1.) It is to be observed, however, of this latter case, first, that the then recent decision of *Wright q. t. v. Horton*, does not seem to have been brought under the notice of the Court of Common Pleas; and secondly, that the Court was not asked to allow the amendment, the point raised being merely whether the record had been irregularly taken down for trial.

1835.

SARUM.

Coram GURNEY B.

SARUM,
March 10.

DOE dem. SMITH v. SMART.

Where the plaintiff in ejectment claims as heir at law, and the defendant as devisee; if the heirship be admitted, the defendant is entitled to begin, though the plaintiff professes to set up an outstanding term as to part of the property.

EJECTMENT.

Crowder for the defendant claimed the right to begin. He stated that he claimed the property in question under the will of a Mrs. Smith, and he admitted that the lessor of the plaintiff was the heir at law of Mrs. Smith, and that she died seised.

Erle resisted this, on the ground that as to part of the property he claimed as assignee of an outstanding term, and that he was prepared to prove the assignment which formed the plaintiff's title to that part of the property independent of the will.

Doe dem. *Tucker v. Tucker*, M. & M. 536., and Doe dem. *Woollaston v. Barnes*, *supra*, 386., were cited.

Crowder refused to admit the assignment.

GURNEY B., after consulting with *Patteson* J., said, My own opinion is confirmed by my brother *Patteson*, that the defendant is entitled to begin. The real question in dispute is the validity of this will. The mischief would be extremely great, if a

party by merely getting an outstanding term should obtain an advantage to which he is not really entitled.

1835.

DOE d.
SMITH
v.
SMART.

Erle, Bingham, and Stone for the plaintiff.
Crowder, Barstow, and Butt for the defendant.

LAUNCESTON.
Coram PATTESON J.

SYMMONS v. BLAKE.

LAUNCESTON,
March 27.

ACTION for slander by words imputing felony to the plaintiff, in receiving stolen goods, knowing them to have been stolen.

In slander where the words proved are unambiguous, evidence of subsequent words of the same import is inadmissible. Previous slander for which damages have been recovered, may be given in evidence.

There were two counts in the declaration; and after proof of the defendant's speaking the words set out in those counts, *Bompas* Serjt., for the plaintiff, offered to give in evidence other actionable words spoken by the defendant, on other occasions, and which imputed to the plaintiff an offence substantially the same as that charged by the words already proved.

This was objected to by the defendant, whereupon *Bompas* Serjt. contended that the words were admissible, as tending to prove that the plaintiff was the person meant in the conversations spoken to.

PATTESON J. I do not think the meaning of the words in this declaration can be mistaken; they are perfectly clear; and if other words of the same or similar import are given in evi-

1835.

DOE d.
SYMMONS
v.
BLAKE.

dence, the damages in this cause may be increased by those words, and yet this record be no evidence in a subsequent action which may be founded upon them. That is the mischief to be guarded against. I understand Lord *Abinger* recently acted on this principle. (a) At *Exeter* I admitted evidence of similar words spoken by the defendant on a previous occasion, and of an action having already been brought, and damages recovered for those words, on the ground that the repetition of the slander charged in the case shewed the malevolence of the party.

Verdict for the plaintiff.

Bompas Serjt. and *Manning* for the plaintiff.
Rowe for the defendant.

(a) See *Pearse v. Ornsby*, *suprà*, 455.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN THE

COMMON PLEAS AND EXCHEQUER,

AT THE SITTINGS AFTER

TRINITY TERM,

6 W. IV. 1835.

ADJOURNED SITTINGS IN C. P.

ISABELLA MILLER *v.* DEMETZ and Others. GUILDHALL,
May 18.

TROVER. The goods in question had been seized by the defendants under the authority of the assignees of one *Waterman*, an insolvent. The plaintiff had lived with *Waterman* as his wife, and in fact was married to him in *December* 1832; but it turned out that *Waterman* was before that time married to another woman, who remained alive up to the time of the action. Some of the goods belonged to the plaintiff before her marriage with *Waterman*, and the rest had been bought with her money: they consisted chiefly of furniture for the house in which the plaintiff and *Waterman* lived, and which house was his property. There was evidence to show that the plaintiff had some time before the insolvency of *Waterman* discovered the fact of his first wife being alive; and there was some evidence to shew her then assuming the nominal control of

The goods of a woman married to and living with an insolvent as his wife, he having a former wife living, do not pass to his assignees (although such goods were in his possession) if she was ignorant of the former marriage. But if she has allowed him the control and management of her property after discovery of the former marriage, such property passes to the assignees.

1835.

MILLER

v.

DEMETZ

and

OTHERS.

the property, though she and *Waterman* continued to live together up to the time of *Waterman's* going to prison.

It was contended that the goods were vested in the assignees under 7 G. 4. c. 57. s. 30. as being in the apparent ownership of *Waterman* at the time he was committed to prison.

On the other side it was contended that as the plaintiff was imposed on, and in fact believed herself married, she could not be said to be consenting to *Waterman's* dominion over the property, and *Glasspoole v. Young*, 9 B. and C. 696. was cited.

TINDAL C. J., in summing up, said it was quite clear that if the plaintiff believed herself to be married, this case would not be within the statute, because she could not be said to be consenting to another person's holding her property, when the right in which he held was that of a husband; and he left the question to the jury, whether she at any time found out the fact of the former marriage, and after that allowed *Waterman* to exhibit himself as the owner of any of the goods; for such goods as she did allow him to appear the owner of, after such discovery, they were to find for the defendants; but for such goods as were not held by him after the discovery, they ought to find for the plaintiff.

Verdict for plaintiff for part of the goods.

Talfourd Serjt. and *R. Gurney* for the plaintiff.
Merewether Serjt. and *Kelly* for the defendant.

1835.

 ADJOURNED SITTINGS IN THE EXCHEQUER.

WAINWRIGHT, Executor of HELEN FRANCES PHOEBE ABERCROMBY v. BLAND and Others, DIRECTORS of the IMPERIAL LIFE INSURANCE COMPANY.

WESTMINSTER,
June 27.

THIS was an action of assumpsit on a policy of insurance bearing date 22d October 1830, and effected with the Imperial Life Insurance Company in the name of the deceased, for the sum of 3000*l.*, to be payable in case she should die within the space of two years from the date of the policy. The policy contained a proviso, that in case the said *Helen F. P. Abercromby* should die by her own hands, &c.; or if any thing averred by the said *Helen F. P. Abercromby* in the statement delivered into the office by her before the date of the policy should be untrue, the policy was to be void.

1. Where A., having no interest in the life of B., induces him to cause a policy of insurance to be effected in his (B.'s) name, A. finding the funds for the premiums, and intending by assignment or otherwise to get the benefit of the policy himself, so that it is substantially the policy of A., such policy is void, as a fraudulent evasion of the statute

The declaration did not contain any averment of interest.

Plea, general issue, *non assumpsit*. (a)

The assured (*Helen F. P. Abercromby*) was an

14 G. 3. c. 48.
ss. 1 & 2.

2. Every man is presumed to have an interest in his own life, and in every part of it, therefore an executor suing on a policy effected by his testator on two years of his life, is not bound to shew that such testator had any special reason for making such limited insurance.

3. Where a policy contains a proviso that it is to be deemed void if any thing set forth in a written statement, signed by the assured, should be found to be untrue, the insurers are discharged by the assured's misrepresenting a material fact, although such misrepresentation was made verbally, and did not form part of the written statement.

(a) The action was commenced before the rules of *Hilary* term, 4 W. 4., came into operation.

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WAINSWRIGHT

v.

BLAND
and
OTHERS.

orphan, residing, together with her sister, in the house of the plaintiff, who was nearly related to them. She attained the age of twenty-one in *March* 1830; the policy was dated in *October* of that year, and she died in the early part of the following *December*, after an illness of a few days. Between the months of *March* and *October* various policies were effected, apparently by herself, upon her own life, and in her own name; none of them for the whole period of life, but the greater part of them (including the policy in question in this case) for two years, and the remainder of them for three years. The total amount of the sums insured by these policies was about 16,000*l.*, and the annual premiums payable upon them exceeded 200*l.* She had besides made proposals, which had not been accepted, for insurances at other offices. She was proved to have no property of any kind to meet the premiums, nor indeed any means of subsistence whatever, excepting an annual pension of 10*l.*, which the government allowed to her as the daughter of a military officer who died in actual service. She was proved to have uninterruptedly enjoyed good health, and no evidence was given to shew that it was desirable for her to effect policies to so large an amount, or to any amount, for periods of two or three years of her life.

Evidence was given by the defendants, that the assured was attended when she went to the defendant's office, and to most of the other insurance offices, by the plaintiff's wife; that the only premium received by the office on this insurance was paid with bank notes, which were traced as having been lent to the plaintiff himself; that when the

assured attended at the defendant's office, she had misrepresented the object she had in view in effecting the insurance; for that in answer to a verbal inquiry by the actuary, why she wished to insure her life for two years, she answered "that she wished to secure a sum for her sister which she should be able to secure another way, if she outlived the two years," (which answer was shown to be false); and the same inquiry being made at the other offices, she had to them given other accounts of her motive for effecting the insurance, such accounts being all inconsistent with each other, and all untrue. She was also asked by the actuary of the defendants, whether she had effected any other insurances on her life; in answer to which, she gave him to understand that she had not, but that she intended proposing at one other office for 2000*l.*, the fact being that at that time she had already effected insurances upon her life to the amount of 11,000*l.*; it was admitted, however, that before the defendants parted with the policy, they had discovered the fact of her having previously insured to the amount of 5000*l.* It was further proved that the plaintiff was in utterly insolvent circumstances; that two of the policies effected in the way above described (not however the policy in this cause) had been assigned by the young lady to the plaintiff a few days before her death, for a nominal consideration; and there was evidence that besides the will, bearing date just before the illness of the testatrix and produced on the trial by the plaintiff, (by which the beneficial interest in all her property was bequeathed to her sister), the plaintiff had, since her death, produced

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WAINWRIGHT

v.

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another will of the testatrix, by which he said she bequeathed the property to himself.

The defendants resisted the action on four grounds : 1st, that there was (as they suggested) some evidence that the death of the assured had been caused by the plaintiff himself; 2dly, that the policy must be treated not as the policy of Miss *Abercromby* in whose name it was effected, but of the plaintiff, who had evidently furnished the money to pay the premiums, and meant, by some means or other, to secure for himself the money secured by the policy; in which case (it was contended) his name, and not her's, should have been used in the policy, under the statute of 14 G. 3. c. 48; 3dly, that if it was a policy really effected by the assured on her own life, it was incumbent on the plaintiff to shew that she had some interest in her life for the two years to which the policy was limited; for that, although a person was presumed to have an interest in the full period of his own life, the presumption did not apply to any shorter term than the whole duration of life: no reason could be suggested for such a limited interest, and public policy required that so dangerous a proceeding should be discouraged; 4thly, that there was a two-fold misrepresentation by the assured on points material for the insurers to know; first, in misrepresenting the object she had in view in effecting the insurance; secondly, in falsely alleging that she had not effected other insurances, on her life. (a)

(a) Evidence was tendered by the defendants that the fact of other insurances having been effected on the life was a material act, and one which ought to have been communicated to the

For the plaintiff, it was answered to the first objection, that there was no sufficient evidence that the plaintiff had been instrumental in bringing about the death of the assured; — and that even if there had been such evidence, it would not be any defence to the action; the policy having been entered into not by the plaintiff, but by the young lady herself. To the second objection, it was answered that the policy was proved to have been effected by Miss *Abercromby* herself, — she had the legal interest in it, and her legal representatives were the parties entitled to recover the amount secured by it — if so, her name, and not the present plaintiff's, was the one which the stat. 14 G. 3. c. 48. s. 2., (a) required to be inserted in the policy, even admitting that she had been induced to effect that policy by the plaintiff, in the hope that he might prevail upon her to let him derive some benefit from it. To the third objection it was answered, that if a party was always presumed to have an insurable interest in his own life, for its whole duration, it must be presumed that he had a proportionable interest in every limited period of that life. To the fourth and last objection, the plaintiff's counsel answered, first, that the Company had in this (as in all instances) required a written answer to certain questions reduced into

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office; but Lord *Abinger* rejected the evidence, saying the jury were to judge for themselves as to the materiality.

(a) “ And be it further enacted, that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.”

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writing ; and by their policy it was provided that if any thing contained in those written answers was untrue, the Insurance should be void. The insurers, after this, were not to be allowed to avoid the policy on the ground that untrue answers had been given to certain other questions, which had been put to the assured verbally, and which she might therefore reasonably suppose to be immaterial ; besides which, neither the amount of previous policies, nor the party's object in effecting them, could be material, within the meaning of the law on that subject, for neither of these circumstances could affect the risk.

Lord ABINGER C. B. (in his address to the jury). This case presents features of novelty. In regard to the manner by which the lady whose life was insured came by her death, there is no evidence from which you ought to infer, that she died any other than a natural death ; but even if such evidence had been brought before you, still, supposing the policy to have been effected *bond fide* by her, I should direct you to find your verdict for the plaintiff, unless you thought that she had wilfully destroyed herself. The greatest good faith is required at the hands of a person effecting an insurance : if that person wilfully assists in bringing about the event which is to subject the insurer to the payment of the money, he cannot enforce it ; but if a third person unlawfully brings about the event, that is no reason why the innocent assured, or his representatives, should not enforce the policy.

But the question in this case is, who was the

party really and truly effecting the insurance? Was it the policy of Miss *Abercromby*? or was it substantially the policy of *Wainwright* the plaintiff, he using her name for purposes of his own? If you think it was the policy of Miss *Abercromby*, effected by her for her own benefit, her representative is entitled to put it in force; and it would be no answer to say that she had no funds of her own to pay the premiums; *Wainwright* might lend her the money for that purpose, and the policy still continue her own. But, on the other hand, if, looking to all the strange facts which have been proved before you, you come to the conclusion that the policy was in reality effected by *Wainwright*; that he merely used her name, himself finding the money, and meaning (by way of assignment, or by bequest, or in some other way), to have the benefit of it himself; then I am of opinion such a transaction would be a fraudulent evasion of the stat. 14 G. 3. c. 48., and that your verdict should be for the defendants.

Again, if you think that the policy was in reality the policy of Miss *Abercromby*, effected by her for her own benefit, still another question arises as to the misrepresentation of facts. A person proposing an insurance on his life, may not be bound voluntarily to disclose to the underwriter how many other policies he may have already effected upon his life; but if the question be asked, is he not bound to answer it truly? Here, the lady at first gives the defendants to understand that she had only proposed an insurance for 2000*l.*, besides that which she effected with them: it is true, that before the transaction was closed between her and

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the defendants, they had discovered the fact of other 5000*l.* having been insured on her life, but it is now proved to you that she had at that very time effected two other policies, for 3000*l.* each, the policies effected amounting, therefore, altogether to 11,000*l.* You are to say, whether in your judgment, the insurance being proposed only for two years, that fact was one which it was material for the office to be apprised of, before they determined upon accepting, or declining the risk. If you think it was, and that the insurers were not apprised of it, you will find your verdict for the defendants.

Upon the only other point, viz. the absence of any insurable interest on the part of the assured, it is contended for the defendants, that a person effecting an insurance upon his own life for a limited time, is bound to shew that he had some particular interest in the continuation of life up to that period; although it is admitted this would not be so in the case of an insurance for the whole term of life: but I am not aware of this distinction having been ever taken, and it does not appear to me there is any force in it. If a party has an interest in his whole life, surely he must be interested in every part of it. Sitting here at *Nisi Prius*, I certainly shall rule that the plaintiff, suing as executor, is not bound to prove that the testatrix had an interest in the continuance of her life for the two years. If I am wrong in that, the defendants may have my opinion revised hereafter. The main question, therefore, for you is, whether the policy was *bonâ fide* the policy of the deceased? If you think it was, and that no material fact was con-

cealed from the underwriters, you will find a verdict for the plaintiff; if otherwise, for the defendants.

The jury not agreeing in a verdict,

A juror was withdrawn.

Erle, Sir *W. Follett*, and *Henderson*, for the plaintiff.

Sir J. Campbell, A. G., *Sir F. Pollock*, *Thesiger*, and *Robinson*, for the defendants.

The cause was carried down by the plaintiff for trial a second time, at the sittings after *Michaelmas* term, 1835, and was again tried before Lord *Abinger* C. B. and a special jury. The evidence was substantially the same; and the learned Chief Baron, after expressing himself to much the same effect as on the former trial, recommended the jury to find a verdict for the defendants, if they thought that the policy was really and substantially the policy of *Wainwright* the plaintiff, he putting forward *Miss Abercromby* as a mere instrument, and effecting the policy in her name, with the design of getting the benefit of it himself, either by will, or assignment, or by some other means; or if they thought that the misrepresentations as to the motive of the assured in effecting the policy, or as to the other policies already effected on her life, were misrepresentations of facts material to be known by the insurers.

The jury found a verdict for the defendants, and added, that they were of opinion that the policy was substantially the policy of *Wainwright* himself; and also, that the misrepresentations were of facts material to be known by the insurers.

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Erle, in the following term, moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground of misdirection by the learned Judge on both points. The Court (without giving any opinion whether the policy was void, as made contrary to the statute 14 G. 3. c. 48., or in evasion of that statute), were clearly of opinion that the finding of the jury on the point of misrepresentation and concealment, was alone a sufficient answer to the action: and the rule was therefore refused. (a)

(a) See 1 Mees. & Welsby, p. 32.

WESTMINSTER,
June 18.

TAYLOR v. ROWAN, Esq.

Where a person applying to be employed in a public office, deposits with the head of the office, a certificate of previous good character, by way of testimonial, and on his ceasing to be so employed, such document is returned to him by the head of the office in a mutilated state,—the head of the office is not, *primâ facie*, responsible for the mutilation. Supposing the head of the

TRESPASS.

The declaration stated that the plaintiff was lawfully possessed of a certain parchment certificate of the said plaintiff, of and relating to the plaintiff, and of and relating to his character, which was and is, as follows: (here the declaration set out a certified character, purporting to have been given by Colonel *Brotherton*, of the plaintiff, on occasion of his leaving his regiment in *July* 1832), and that the plaintiff being so possessed the defendant on &c. with force and arms, marked, stamped, printed, and impressed, and caused to be marked, &c., the words following (that is to say) “Dismissed the Police Service 19th March, 1834,” in red, legible, and conspicuous characters, upon and across the said certificate, whereby the

office to be the person who mutilated the document, the remedy against him is by action on the case, not by trespass.

same certificate became defaced, &c., and rendered wholly useless, and plaintiff hath thereby been prevented from using the same as a testimonial of the good character and conduct of the plaintiff during the period that he served in the army, for the purpose of obtaining employment, &c.

Plea, general issue. (*a*)

The defendant, Colonel *Rowan*, was one of the two chief commissioners of the Metropolitan Police. For the plaintiff, it was proved that he had been a private in the army, and that on leaving that service, he had obtained the discharge or certificate described in the declaration, from his commanding officer — that in *May* 1833, (having left the army) he made a written application to the Commissioners of Police, praying to be admitted into the Police Service: and on that occasion transmitted to them in the usual way, (amongst other documents to recommend his application), the certificate set out in the declaration; the documents were kept by the Commissioners (as appeared to be the practice of the office) and the plaintiff was appointed a constable in the service in *July* 1833. In *March* following he was dismissed for drunkenness and disorderly conduct, on which occasion he made a written request to the Commissioners of Police to have his discharge from the regiment returned to him. It was accordingly returned to him; but had then been stamped in print with the words complained of in the declaration. This appeared to be in pursuance of the practice at the office; but there was nothing to bring the act home to Colonel *Rowan*, excepting

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(*a*) See Stat. 10 Geo. 4. c. 44. s. 41.

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that the document was returned to the plaintiff in a letter from that gentleman, stating simply that he therewith returned the document asked for. The letter described the document, but made no allusion to the stamping. The whole of the letter was in lithograph, except the signature, which was in the defendant's hand-writing, and the description of the document, which was written in another hand.

The plaintiff failed to show special damage, but his counsel contended that the act complained of was a wrongful act, for which *per se* the plaintiff was entitled to damages.

Ellis for the defendant contended, first, that there was nothing proved which would subject Colonel *Rowan* to this action, there being no evidence that he had either done, or authorised, the act complained of. Secondly, that even if Colonel *Rowan* was to be deemed responsible for the act, it could only be by an action on the case: the plaintiff had voluntarily parted with the possession of the document to the Commissioners of Police, and if they damaged it, whilst in their hands, they might indeed be liable in a special action on the case, but could not be liable in trespass.

Platt and *Wordsworth contra*, insisted that as the document was delivered to the two Commissioners (of whom the defendant was one) in an entire and un mutilated state, and was returned by the defendant in a defaced and damaged state, the presumption was, that *he* was the wrong-doer; and the jury would find him to be so, unless he rebutted that presumption by accounting for the act. On the other point, they said that there

was no evidence that the plaintiff had parted with the right of possession; he had trusted it to the defendant for a given purpose, and had a right at any instant of time to re-demand it. He had therefore the general property and a right of possession, which, in personal chattels, was sufficient to support trespass; and they cited *Lotan v. Cross*, 2 Campb. 465.; *Hall v. Pickard*, 3 Campb. 187.; and *Wilson v. Barker*, 1 Nev. & Mann. 409.

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LORD ABINGER C. B. was about to nonsuit the plaintiff, but *Platt* pressing that the case might go to the jury, his LORDSHIP, in his address to them, expressed a strong opinion that the action was misconceived, and that supposing any form of action could have been successfully resorted to (which he was far from suggesting), trespass was not the proper form. The document supposed to have been injured was, at the time of the alleged injury, in the lawful possession of the Commissioners of Police, into whose hands the plaintiff had himself committed it—for an injury done to it whilst in their custody, he could not maintain any action of trespass. Then as to the party against whom the action was brought, there was nothing to show that the defendant had done the act: on both grounds therefore, the defendant was entitled to their verdict.

The jury found a verdict for the defendant.

Platt and *Wordsworth* for the plaintiff.

T. F. Ellis for the defendant.

In *Michaelmas Term* following, *Platt* moved

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for a new trial, on the ground that the LORD CHIEF BARON had improperly directed the jury that the action was misconceived, and that they must therefore find a verdict for the defendant. But the court, without entering upon that question, were clearly of opinion that there was no sufficient evidence to connect the defendant with the stamping of the certificate, and that that ground alone was quite sufficient to justify the verdict.

Rule refused.

WESTMINSTER.
June 22.

BRADY and Wife v. GILES.

In an action for damage done through negligent driving of a carriage and horses let to hire and driven by the servants of the owner, it is a question for the Jury whether the servants were acting as the servants of the person hiring, or of the owner.

CASE to recover compensation for an injury sustained by the female plaintiff, in consequence of the negligent driving of a barouche by the defendant's servants. Plea, Not Guilty.

The defendant was a carriage-jobber in *London*, letting out carriages and horses on hire. On the 22d *June* 1834, a Mr. *M'Kinlay* applied to the defendant for a barouche and four horses, for the purpose of making an excursion for two days to *Windsor*, and back to town. The defendant accordingly furnished him with the barouche in question, and four horses, which were driven by two of his, the defendant's, postilions. Whilst the postilions were conducting the barouche back to town, on the evening of the second day, (Mr. *M'Kinlay* and one of his friends being on the box), the barouche came in contact with the plaintiff's gig, and the injury complained of in the declaration arose in consequence of that collision. There was no evidence that

Mr. *M'Kinlay*, or any of his party, interfered in the manner of driving, but there was (as usual) conflicting evidence, as to whether the accident was attributable to the negligent driving of the postilions, or to the carelessness of the plaintiff himself; and it was further contended on the part of the defendant, that the plaintiff should be nonsuited, even admitting the accident to have been caused by the improper conduct of the postilions, inasmuch as the action was not maintainable against the present defendant, but should have been brought against *M'Kinlay*, the party who had hired the barouche and the postilions, under whose control the horses must be taken to have been when the accident arose.

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For the plaintiff on the other hand it was answered that the postilions were not the servants of Mr. *M'Kinlay*, who neither selected nor paid them (excepting such gratuity as he might choose to bestow on them), and the inconvenience was pointed out which must arise, if, in cases of this kind, a person sustaining an injury was obliged to ascertain the name and address of the individual having the temporary use of the carriage on hire.

Lord ABINGER C. B. refused to nonsuit the plaintiff. His Lordship said it had always appeared to him that the Court of King's Bench had pursued an erroneous course in *Laugher v. Pointer* (a) when they allowed the question now raised to be discussed as if it were a question of law for the Judge to decide. It always appeared to him that it was

(a) 5 B. & C. 547.

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quite impossible to lay down any rule of law on such a point. No satisfactory line could be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of the driver, ceased to be responsible, and the temporary hirer became so. Each case of this class must depend upon its own circumstances; and the Jury, taking the circumstances of the present case into consideration, must undertake the task of deciding whether, at the time of the accident, the postilions were acting as the servants of the defendant, or as the servants of *M'Kinlay*. If they thought that they were acting as the servants of the defendant, and that the accident arose from their improper conduct, they would find for the plaintiff.

Verdict for the plaintiff.

Erle and *R. V. Richards* for the plaintiff.

Humfrey and *Miller* for the defendant.

WESTMINSTER,
July 3.

CREEVEY v. BOWMAN.

The person under whom the defendant justifies in trespass, may be rendered a competent witness for the defendant by indorsement on the record under 5 & 4 W. 4. c. 42.

TRESPASS.

First count, for breaking and entering plaintiff's house. 2d. for assaulting plaintiff.

Pleas, 1st. Not Guilty to the whole declaration.

2d. As to second count. That one *Mary Creevey* was in possession of the house in the first count mentioned, that plaintiff was therein without

the leave of the said *Mary*, making a noise and disturbance ; that the said *Mary* thereupon requested plaintiff to depart ; that he refused to do so ; and that defendant, as her servant, and by her order, removed him.

Replication, That defendant was not the servant of the said *Mary*, but committed the trespass of his own wrong.

Platt for the defendant, called *Mary Creevey*.

Bompas Serjt. objected that she was incompetent ; if there was a verdict against the defendant, he would have an action over against her. (a)

PARKE B. If her name be indorsed on the record, the defendant will not be able to use this verdict against her.

Bompas Serjt. It has been held by Lord *Lyndhurst* (b) that the 3 & 4 W. 4. c. 42., does not apply to a case like this, and the same doctrine has

(a) The law, generally speaking, neither implies, nor will sanction, any contract of indemnity between tortfeasors : but the rule does not seem to apply where an innocent agent is employed to do acts not unlawful in themselves, for the purpose of asserting some right of the employer. (See the concluding passage in Lord *Kenyon's* judgment in *Merryweather v. Nixon*, 8. T. R. 186.). In such a case an express promise of indemnity would be valid ; (*Fletcher v. Harcott*, Hutt. 55. ;) and at the present day the Courts would probably hold that such a promise might be implied, where the relation of master and servant exists, and the latter ignorantly obeyed an order which he could not at that time know to be unlawful. (See the judgment of *Best* C. J. in *Adamson v. Jarvis*, 4 Bingh. 66.)

(b) *Burgess v. Cuthill*, *suprà*, p. 315.

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been laid down in two or three cases by other Judges.

PARKE B. I know those cases, but I have always ruled differently, and my ruling has never been afterwards questioned. The statute would be frittered away if a contrary construction were put upon it; I shall admit the witness (her name being indorsed on the record), and you may apply to the Court if you think I am wrong.

A juror was ultimately withdrawn upon an arrangement between the parties. (a)

Bompas Serjt. and *Mansel* for the plaintiff.
Platt and *Hoggins* for defendant.

(a) See *Pickles v. Hollings*, *suprà*, p. 468.

GUILDHALL,
July 11.

CHATTOCK v. SHAWE and Others.

Where a policy of insurance contains a warranty that the assured "has not been afflicted with, nor is subject to, gout, vertigo, fits," &c., such warranty is not broken by the fact of the assured's having had an epileptic fit in consequence of an accident. — To vacate such policy it must be shown that the constitution of the assured was naturally *liable* to fits, or by accident or otherwise had become so *liable*.

ASSUMPSIT. This was an action on a policy of insurance effected by the plaintiff, and signed by the defendants as directors of the Eagle Insurance Company, in *July* 1831, upon the life of Lieutenant-Colonel *Greswolde*.

Plea (a), the general issue.

The policy recited that the plaintiff had delivered to the office a certain statement or declar-

(a) The plea was pleaded before the rules of *Hilary* term 4 *W. 4.* came into operation.

ation, touching the said Lieutenant-Colonel *Greswolde*, wherein it was (amongst other things) alleged, that the assured “ is now in a sound and “ perfect state of health, and has not been afflicted “ with, nor is subject to, gout, vertigo, *fits*, he- “ morrhage, dropsy, asthma, consumption, or to any “ disease, ailment, or bodily infirmity, or symptom “ of any disease, ailment, or bodily infirmity, nor “ accustomed to any intemperate habits, which can “ tend to the shortening of life :” and the policy contained a proviso, that the insurance was to be valid only in case the declaration above referred to contained a true and faithful representation of the facts therein mentioned.

Colonel *Greswolde* died in *January* 1833.

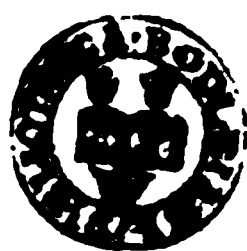
For the defendants it was attempted to be shewn that the policy was void on two grounds : 1st, because at the time it was effected, Colonel *Greswolde* was accustomed to very intemperate habits of drinking, which tended to the shortening of life ; 2dly, because he had been afflicted with and was subject to fits.

In respect of the fits, it was admitted in the plaintiff’s opening, that in the year 1827 the Colonel had been attacked by a seizure, said to be of an epileptic character, whilst quartered at *Macclesfield*, and by a second seizure of the same kind a few days after ; it was also attempted to be shown on the part of the defendants, that the Colonel had been frequently afflicted with similar seizures between the occurrence at *Macclesfield* and the date of the policy, and from thence to the time of his death, the immediate cause of which was stated to be a fit of some kind, at a time when he

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was keeping his bed, and labouring under a dangerous attack of some species of cholera. The evidence as to the fits, (except the two at *Macclesfield*, and that which took place immediately before the Colonel's death,) was, however, of a very doubtful, and frequently of a contradictory, nature; and as to the *Macclesfield* fits, the plaintiff gave evidence that they were the immediate result of an accident which happened to the Colonel in a scuffle, in the course of which he either fell, or was cast down, some stone steps, and received a very severe injury in the head; the Colonel having been free from all tendency to fits up to this time, and never having experienced any recurrence of them (as the plaintiff contended) since.

LORD ABINGER C. B., in his address to the jury, after commenting on the evidence, as to the alleged intemperate habits of Colonel G., proceeded thus: If the only fits of which proof were given had been the *Macclesfield* fits, I should have said, there was no breach of this warranty; for the interpretation I put on a clause of this kind is, not that the party never accidentally had a fit, but that he was not, at the time of the insurance being made, a person habitually or constitutionally afflicted with fits; a person liable to fits from some peculiarity of temperament, either natural, or contracted, from some cause or other, during life. You are to say whether the evidence has satisfied you that these fits at *Macclesfield* were the result of accident, and did not lead to any recurrence of fits in after life, or whether you think that the defendants have shewn that the Colonel was attacked by other seizures of the same kind after the *Macclesfield* fits; because if the evidence as

to those seizures is to be depended upon, they not being pretended to be the result of any accident, would seem to shew that the party was, from the date of the *Macclesfield* fits, a person subject to that disorder, within the meaning of the proviso. In that case your verdict will be for the defendant.

Verdict for the plaintiff.

Talfourd Serjt., *Thesiger*, *Cresswell*, and *Robinson* for the plaintiff.

Sir *J. Campbell* A. G., Sir *F. Pollock*, *Erle*, Sir *W. Follet*, *R. V. Richards*, and *Beetham* for the defendant.

In *Michaelmas* term following a rule *nisi* for a new trial was obtained, on the ground that the verdict was against evidence. No objection was made to the direction of the learned Lord C. B., and, in the course of the argument, *PARKE* B. expressed his concurrence therein. The rule was afterwards discharged.

SUMMER ASSIZES, 6 W. IV.

EXETER.
Coram GURNEY B.


JAMES *v.* SALTER and Another.

EXETER,
July 28.

REPLEVIN. The defendants avowed taking goods as a distress for an annuity under the will of *John Salter*, deceased. The plaintiff pleaded in bar of the avowry, that the annuity de-

In replevin any issue in which the affirmative is on the plaintiff gives him the right to begin.

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devised by the will was first charged on certain leasehold lands of which the testator died possessed; and in default or deficiency of the leaseholds, then on the premises on which, &c. In their replication to this plea, the defendants traversed that the testator died possessed of the leasehold land; on which issue was taken. There were other pleas in bar, the issues upon which were upon the defendant.

Erle, for the plaintiff, claimed to begin, on the ground that the issue on the 1st plea in bar was on him.

Bompas Serjt. contended that the defendant in replevin had a right to begin, as he was in substance the plaintiff, and the issues on him gave him the right to begin.

GURNEY B. held that the same rule prevailed in replevin as in other actions, that any one issue on the plaintiff gave him the right to begin.

Erle accordingly began, and put in his evidence.
Verdict for the plaintiff.

Manning, *amicus Curiaë*, cited a case not reported, of *Rose v. Brown*, in which GIBBS C. J. ruled that in replevin as well as in other actions, one issue on the plaintiff gave him the right to begin.

Erle and *Crowder* for the plaintiff.

Bompas Serjt. and *Butt* for the defendant.

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BODMIN.
Coram GURNEY B.

REX v. WILLIAMS.

BODMIN,
Aug. 4.


THE prisoner was tried and acquitted on a charge of feloniously cutting *C. Warren*, when a fresh indictment for the common assault was ordered to be preferred by the Judge. On this indictment being returned,

Moody, for the prisoner, applied to traverse till the next assizes. Although the prisoner has been held to bail to answer the charge of felony for more than twenty days before the assizes, yet the statute does not take away the traverse for a misdemeanor. *Rex v. James*, 3 Carr and P. 222. was cited in support of the application.

A party acquitted of a felony, for which he has been held to bail, or committed more than twenty days, is entitled to traverse on an indictment being preferred against him for the same transaction as a misdemeanor.

Praed argued that the case came within the statute, 60 G. 3. and 1 G. 4. c. 4. ss. 3. 5.

GURNEY B. The case is clearly not within the words of the statute. The words "such offence" in the 5th section must mean the misdemeanor there mentioned, and the evidence for the defence may be different in the two cases. I remember trying a prisoner on the northern circuit, for a common assault, who had been tried for the very same offence as this prisoner at the previous assizes, and this course must have been adopted by the Judge who presided at the trial for the felony — my brother ALDERSON, I believe.

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 WILLIAMS.

The prisoner was allowed to traverse, and discharged on recognisances to appear and answer.

Praed for the prosecution.

Moody for the prisoner.

LIVERPOOL.

Coram LORD ABINGER C. B.

LIVERPOOL,
 Aug. 20.

HARRISON v. RICHARDSON.

On a plea
 "that the defendant did not make the promissory note mentioned in the declaration," he cannot give in evidence that he was of imbecile mind at the time when he made it.

ASSUMPSIT against drawer of a promissory note.

Pleas:—1st, that the defendant did not make the note, and issue thereon. 2d, that the defendant when he made the note was of imbecile mind. *Replication*, that the plaintiff had not notice of the defendant's imbecility of mind, and issue thereon.

The defendant being unable to prove that the plaintiff had such notice, *Cresswell* proposed to show defendant's imbecility of mind, as alone constituting a defence; and he contended that he was at liberty to do this upon the first plea, inasmuch as it was a matter operating not by way of confession and avoidance, but by way of denial.

LORD ABINGER C. B. (after referring to the 1st rule of Hilary Term, 4 *W.* 4. s. 3.) was of opinion that such a defence could not be gone into on the general plea that the defendant did not make the note: and the evidence was rejected.

Verdict for the Plaintiff.

Alexander and *Wightman* for the plaintiff.

Cresswell and *Tomlinson* for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B. C. P. AND EXCHEQUER,

AT THE SITTINGS IN AND AFTER

MICHAELMAS TERM,

6 W. IV. 1835.

SITTINGS IN TERM.

MACINTOSH v. WEILLER.

WESTMINSTER,
Nov. 6.

DEBT for 1000*l.* for goods sold and delivered.

A particular of the plaintiff's demand had been delivered with the declaration, and was attached to the record, in which were specified the various goods sold, the dates of the sales, and the prices, amounting altogether to 675*l.*

Plea, that the defendant on &c., and on divers other days and times before the commencement of the action, paid to the said plaintiff the said sum of 675*l.*

Replication, taking issue on the plea. No one appearing to support the plea *Robinson*, for the plaintiffs, submitted that he was entitled to a verdict for the balance claimed, 675*l.*: the plea in effect confessed the debt as stated in the declaration, and pointed out in the particulars.

Quære, whether in an action of debt, the defendant pleading payment, and not appearing to support his plea, the plaintiff is bound to prove the amount of his debt?

1895.

MACINTOSH

v.

WEILLER.

LITTLEDALE J. You are entitled to a verdict, but unless you prove the amount, the verdict can only be for a nominal sum.

Robinson adverted to the form of the action, viz. debt; contending that in that form of action, if there had been no plea, the plaintiff would have been entitled to sign judgment for the balance, without producing any evidence of the amount: here there was a plea, but the defendant not maintaining it, the plaintiff was entitled to proceed in the same way as if there had been judgment for want of a plea.

LITTLEDALE J. If it had been *assumpsit*, the plaintiff must clearly have given evidence of the amount. I know a notion has prevailed that this is not necessary in actions of debt. I will not positively decide that the plaintiff *must* here give evidence of the amount; if he choose to take a verdict for the balance he claims, he may do so at his peril; but I think the evidence certainly ought to be given.

On this intimation of the learned Judge's opinion, the delivery and price of the goods were proved in the usual way.


Verdict for the debt, 1000*l.*, and one shilling damages. Execution to go for 675*l.* (a)

Robinson, for the plaintiff.

The action was undefended.

(a) It is apprehended that the form of the verdict ultimately

taken, shews that the plaintiff was under no necessity to give evidence of the amount, for even after the evidence had been given, the verdict was not for the sum proved due by the evidence, but for the sum nominally demanded by the declaration. Had the action been *assumpsit*, the plaintiff would have been bound to prove the amount; and accordingly, in *Batley v. Catterall* * where to a count in *assumpsit* for goods sold, the defendant pleaded a set off, and then failed to appear at the trial in support of his plea, ALDERSON B. ruled that the plaintiff was bound to prove the amount of the goods sold, although it was contended for the plaintiff that the particular of demand having specified the precise amount demanded, the defendant, by pleading only a set off, had in effect confessed the amount, and relieved the plaintiff from the burden of proving it.

1835.

 MACINTOSH
 v.
 WEILLER.

* Reported as to another point *suprà*, p. 379.

SITTINGS AFTER MICHAELMAS TERM.

POWER v. BARHAM.

WESTMINSTER,
 Nov. 26.

ASSUMPSIT for breach of contract on sale of pictures. The declaration alleged, that in consideration the plaintiff would buy of the defendant four pictures, for the sum of 160 guineas, the defendant undertook that the pictures were painted by *Canaletti*.

Breach, that they were not painted by that master.

Plea, that the defendant did not undertake *modo et formâ*, and issue thereon.

The evidence as to what took place between the parties at the time of the sale was not satis-

The description of a picture as being the work of a particular master in an invoice is not a warranty that the picture was painted by that master; it is a question for the jury under the facts of the sale whether a warranty was intended.

1835.

POWER
v.
BARHAM.

factory, and the plaintiff did not make any claim on the defendant for compensation till a long time after the transaction. His counsel relied very much on the warranty contained (as they contended) in the bill of parcels, which was sent to the plaintiff with the pictures, at the time when the latter were delivered. The bill of parcels was as follows:—

“ Mr. *Power*,

“ Bought of *J. Barham*,

“ Four pictures—Views in *Venice*, *Canaletti*,

“ 160 guineas.”

For the defendant it was contended that this did not amount to a warranty. The utmost inference to be drawn from the language of the bill of parcels was, that at the time of the sale the pictures were treated as *Canaletti*'s, each party supposing them, probably, to be such—but this was very different from a warranty. In *Jendwine v. Slade* (a) Lord *Kenyon* ruled that the insertion of a particular picture in a catalogue, under the name of an old master, was not such a warranty as would subject the vendor to an action. Had this been an action of deceit, and any fraud had been shown, the question might be different.

COLERIDGE, J., in summing up the evidence, told the jury, that the question for them to decide was, whether a representation had been made, as part of the contract, that the paintings were *Canaletti*'s, or whether such a representation had been made merely as matter of opinion. In de-

(a) 2 Esp. 572.

termining that question they were to look to all the circumstances of the case. In regard to the bill of parcels, there is no rule of law by which a representation contained in that sort of instrument acquires a different force from any other representation attending a sale. Lord *Kenyon* in the case cited, did not mean to lay down any rule of law : he could only have meant to suggest to the jury, whether in point of fact it was not more probable that, under the circumstances of that case, the vendor in drawing up his catalogue assigned the names of the various painters, as mere matters of opinion. The representation of the catalogue in that case could not be considered necessarily decisive of the question, nor can the bill of parcels in this. The question is one of fact ; and the jury are to say whether, on the whole, the words of the bill of parcels meant a warranty, or a mere expression of opinion.

Verdict for the plaintiff.

Platt and *Hayes* for the plaintiff.


Sir J. Campbell, A. G. for the defendant.

1835.

POWER

v.

BABHAM.

1835.
WESTMINSTER,
Nov. 26.

PERRING v. BROOK.

An instrument will operate as a lease, or an agreement for a lease, according to the intention to be collected from the whole instrument.

ASSUMPSIT to recover rent for the use and occupation of a house, and money laid out by the plaintiff in keeping up an insurance on it.

Plea—*Non assumpsit*.

The plaintiff tendered in evidence an instrument purporting to be an agreement bearing date the 21st of *May*, 1835, signed by the defendant, which purported that it was thereby agreed that the plaintiff would by indenture grant to the defendant, and that the defendant would accept, a lease of the premises for a term, commencing on the day of the agreement and at the rent and subject to the covenants and right of re-entry therein specified; one of which covenants was, that the defendant would repay to the plaintiff such sums as he should expend in keeping the premises insured. The instrument also purported that it was thereby agreed that until the execution of the lease, the defendant should occupy the premises on the same terms as were to be contained in the lease, and the plaintiff was to have in the mean time the same right of re-entry, in case of breach of any of the clauses in the agreement, as he would have under the lease when

granted. “ Provided always that this present
“ instrument is not to operate as a lease, or any
“ further or otherwise than as an agreement for a
“ lease.”

1835.
PERRING
v.
BROOK.

The instrument had not a lease stamp impressed upon it, but only an agreement stamp.

Ball, for the defendant, objected that as the instrument gave the tenant immediate right of possession, it operated as a present demise, although a future more formal instrument of lease might be contemplated, and, consequently, it ought to have had a lease-stamp: *Poole v. Bentley (a)*. The proviso at the end could not alter the legal character of the instrument, and was in reality a mere evasion of the stamp act.

COLERIDGE J. The cases on this subject are very numerous, but the principle which governs them all is this: that the intention of the parties, collected from the terms of the instrument must determine whether that instrument be a lease or only an agreement. Here there are undoubtedly some clauses from which, if they stood alone, one would have inferred an intention that the instrument was to have the effect of a lease; but when there is an express proviso declaring that, notwithstanding those clauses, the instrument is to operate only as an agreement, I am clearly of opinion that I must treat it as an agreement, and not as a lease.

(a) 12 East, 168.

1835.

PERRING
v.
BROOK.

The instrument was accordingly read, and there
was a

Verdict for the plaintiff

S. Martin for plaintiff.

Ball for defendant.

ADJOURNED SITTINGS IN THE COMMON PLEAS.

GUILDHALL,
Dec. 18.

COOK v. ROUND, Esq., Sheriff of *Essex*.

In an action
for an escape,
the sheriff is
bound by the
statement in
his return, not
only as to the
fact of the
arrest, but also
as to the day
on which it
was made.

DEBT for suffering one *William Smith* whom the
defendant had arrested on a ca. sa. at the plaintiff's
suit, to escape.

Pleas : 1st, that the defendant did not arrest the
said *William Smith* ; and issue thereon.

2d, that the defendant did not permit or suffer
the said *William Smith* to escape or go at large &c. ;
and issue thereon.

3d, that the defendant arrested the said *William Smith*, under colour of the said writ of ca. sa. on 20th *March* 1834, and that the said *William Smith* was not nor could be found within the bailiwick of the defendant at any time before that day. That after such writ was delivered to the defendant, but before the arrest and before the said *William Smith* was found in the defendant's bailiwick, to wit on 19th *March* 1834, a writ of *Hab. Corp.* issuing out of the Court of Exchequer, was de-

livered to the defendant, by which the sheriff of *Essex* was commanded to have the body of the said *William Smith*, together with the cause &c. before the Chief Baron immediately after the receipt of the writ to do and receive &c. ; and that the said *William Smith* being in his custody under colour of the ca. sa. ; the defendant by virtue of the said writ of *Hab. Corp.*, afterwards to wit, on the day and year last aforesaid, took and had the body of the said *William Smith*, together with the cause of his detainer before the said Chief Baron &c. ; and the said Chief Baron then received the body of the said *William Smith* &c., and committed him to the custody of the Warden of the *Fleet* &c. Without this, that the said *William Smith* was at any time after the delivery of the ca. sa. taken or arrested by the said defendant *modo et formâ* before or until the said 20th day of *March* 1834.

Replication, that the defendant after the delivery of the ca. sa. to him, and before the delivery of the writ of *Hab. Corp.* and before the 20th of *March* 1834 ; to wit, on 1st *March* 1834, took and arrested the said *William Smith* under and by virtue of the writ of the ca. sa., and that having the said *William Smith* in his custody under the said writ, upon and after the said arrest, and before he took him before the Chief Baron, to wit, on same day and year last aforesaid ; the said defendant *otherwise than in obedience to the said writ of Hab. Corp. or by virtue thereof*, wrongfully &c., and without the plaintiff's leave &c., suffered the said *William Smith* to escape &c. ; and that the plaintiff sued out his writ of summons in

1885.

Cook

v.

Round.

1835.

Cook

v.

ROUND.

this action, and declared thereon against the said defendant for the said escape so newly assigned.

Rejoinder, that the defendant did not ever after he had the said *William Smith* in his custody at the suit of the plaintiff, under the ca. sa., and before the said *William Smith* was delivered to the Chief Baron, under the said writ of *Hab. Corp.* permit or suffer the said *William Smith* to escape &c.

Issue thereon.

To shew that the defendant had arrested *William Smith* before the 20th *March*, the plaintiff put in evidence, and relied upon the sheriff's return. The ca. sa. had been delivered by the plaintiff's attorney to the under-sheriff to be executed; the under-sheriff delivered it to one *Mackenzie*, a bound bailiff of the sheriff, who executed it, receiving the necessary instructions from the plaintiff's attorney, and then made his return to the under-sheriff, who duly indorsed it on the writ as follows: "By virtue of his Majesty's writ to me directed, I took the within named *W. Smith*, and safely kept him in my custody until afterwards, to wit, on the 18th day of *March* 1834, I received his Majesty's writ of *Hab. Corp.* commanding me to have the the body of the said *W. S.* before the Right Honourable JOHN SINGLETON, Lord LYNTHURST, Lord Chief Baron, immediately after the receipt of that writ; by virtue of which said writ, and in obedience thereto, I had the body of the said *William Smith*, with the last mentioned writ, and the return of the within cause mentioned in a certain schedule thereunto annexed, before the said Lord Chief Baron, on the 19th day of the said month of *March*, who there received of me

the body of the said *W. Smith*, and committed him to the Warden of the *Fleet*, and altogether exonerated and discharged me from the further keeping of the said *William Smith*, whereupon I cannot have the body &c.

JOHN ROUND, Esq., Sheriff."

The plaintiff then gave evidence to shew that *William Smith* was seen at large on the 18th and 19th of *March*.

For the defendant evidence was offered to shew that, in point of fact, *William Smith* was not arrested till the 20th of *March*, the day when he was committed by the Lord Chief Baron to the *Fleet*.

Wilde, Serjt. objected that such evidence could not be received; it would be of most mischievous consequence if the Sheriff were thus allowed to contradict the plain language of his own return.

Kelly, for the defendant. Undoubtedly the Sheriff is bound by his return, as to the substantial contents of that return: but when immaterial statements are introduced into it, he may explain or correct them, by shewing the real truth of the case. Now, here, the precise day when the arrest was made is not the substance of the return. It is sufficiently hard upon the Sheriff that he is concluded by the acts of his officers: but it has never yet been ruled that he is bound by their irrelevant statements, and that part of the return which alleges the day of the capture is here irrelevant.

TINDAL C. J. I am strongly of opinion that the return is conclusive upon the Sheriff. If, however,

1835.

Cook

v.

Round.

you have evidence to shew that the party was not arrested at the time stated in the return, I will receive it, giving the plaintiff leave to enter a verdict, supposing the jury give effect to your evidence.

Kelly then gave evidence that *William Smith* was not arrested until the 20th of *March*; but the jury, without hearing the reply, expressed themselves satisfied that the arrest took place on the 18th, and thereupon found a

Verdict for the plaintiff.

Wilde, Serjt., *Shee*, and *Addison* for plaintiff.
F. Kelly, for the defendant.

His Lordship after the verdict was given, desired that it might not be inferred from his having allowed the defendant to give evidence in contradiction of his return, that he thought the defendant was entitled so to do; on the contrary, his opinion was, that the return bound the Sheriff.

1895.

ADJOURNED SITTINGS IN THE EXCHEQUER.

ODYE and Others, Assignees of MOON a bankrupt, v. COOKNEY and Another.

GUILDHALL,
Dec. 10.

TROVER for deeds.

A mortgage deed for 1000*l*. was put in evidence for the plaintiffs, on which was an indorsement of the defendant *Cookney*'s writing, beginning with "I acknowledge that the within 1000*l*. has been paid and satisfied;" it then went on as an agreement to assign.

A receipt indorsed on the back of a stamped deed may be separately read in evidence, though it be part of an indorsement requiring another stamp.

It was objected by Sir *F. Pollock* that this indorsement could not be read for want of a stamp. The whole indorsement was an agreement requiring a stamp; though the receipt alone would not, because the deed itself was stamped.

Erle contra, said that he only wanted the receipt, and that was admissible without a stamp.

Lord ABINGER C. B., after reading the whole indorsement, decided that the receipt alone might be read.

The plaintiffs were nonsuited.

Erle, Kelly, Wightman, for the plaintiffs.

Sir *F. Pollock, Cresswell, Addison*, for the defendants.

1835.

GUILDHALL,
Dec. 14.

WOOTTON and Another v. BARTON.

In covenant where the affirmative of the issues is on the defendant he is entitled to begin, though the damages are unascertained.

ACTION on a covenant that the defendant would at the end of a certain term demise to the plaintiff, repurchase the stock, &c. on the premises.

Plea, that the plaintiff had fraudulently removed all the valuable part of the stock, and had left nothing on the premises but the worthless goods. Issue thereon.

Thesiger, for the defendant, claimed the right to begin as the issue was on him, he cited 6 C. & P. 64.

Bompas Serjt. for the plaintiff, said that Lord *Denman* C. J., *Tindal* C. J., and Lord *Abinger* C. B. had all decided that where damages were the object the action, and these damages unascertained, the plaintiff should begin. He understood that the learned Judges had agreed upon some general rule of that nature ; and he referred to *Carter v. Jones*, *suprà*, p. 281.


PARKE B. The only rule laid down by the Judges was, that in actions for personal injuries where damages are sought as in actions of assault, &c. and in libel and slander, the plaintiff should begin. The general rule is, that the party on whom the issue is shall begin ; this was not altered by

the resolution of the Judges referred to in *Carter v. Jones*. I shall rule that the defendant is entitled to begin.

Verdict for plaintiff. (a)

Bompas Serjt., *Kelly*, and *Wightman*, for the plaintiffs.

Thesiger, *Cresswell*, and *Crompton*, for the defendant.

1835.

 WOOTTON
 and
 ANOTHER
 v.
 BARTON.

(a) In fact no evidence was given in this case by the plaintiff as to the damages, it being agreed, immediately after the decision on the right to begin, that the damages should be referred. See *Reeve v. Underhill*, *suprà*, p. 440. *Absalom v. Beaumont*, *suprà*, 441. (note.)

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN THE COURTS OF
KING'S BENCH AND COMMON PLEAS,
AT THE SITTINGS AFTER
HILARY TERM,
6 W. IV. 1836.

ADJOURNED SITTINGS IN KING'S BENCH.

1836.

WESTMINSTER,
Feb. 3.

SIGGERS v. BROWN.

If the notice of dishonour sent to the drawer of a bill arrives too late through misdirection, it is for the jury to say whether the holder used due diligence to find the drawer's address.

THIS was an action by the second indorsee against the drawer of a bill of exchange.

Pleas—1st. That the bill was not duly presented for payment to the acceptor.

2dly. That no due notice of the dishonour of the bill was ever given to the defendant.

The bill was dated "London, 1st October, 1835," and signed by the defendant, "Mary Brown." It was proved that it was duly presented for payment to the acceptor and dishonoured; and that on the day after such dishonour, the plaintiff put a letter into the twopenny-post, directed "Mrs. Mary Brown, Knightsbridge Road." The letter contained a sufficient notification of the dishonour; but it did not reach the defendant until three or four days after it had been put into the post, by

reason that the defendant did not reside in Knightsbridge Road, but in Knightsbridge Row. It was proved that when the plaintiff took the bill from his immediate indorser, he enquired where Mary Brown, the drawer, lived, and that a verbal answer was given that she lived in Knightsbridge Road.

1836.

SIGGERS
v.
BROWN.

Erle, for the defendant, insisted that it was incumbent upon the holder of a bill, if he chose to give the drawer notice of the dishonour by letter, to take care that his letter was properly addressed; here, by the fault of the plaintiff, the notice had in fact never reached the drawer until the proper time had long elapsed.

Wightman, contrd. It has been held that the holder is not bound to do more than follow the address which the drawer chooses to give on the face of his own bill. *Mann v. Moors*, (a) — In that case, the bill was dated “Manchester,” and Lord *Tenterden* held that the holder was justified in addressing the letter, which contained the notice, to the drawer at Manchester, *generally*. There it did not even appear that the holder had taken any measures to ascertain the drawer’s real residence; here, he has, for he made enquiry of the party from whom he received the bill, which was using a reasonable degree of caution.

Lord DENMAN, C. J., in summing up to the jury, said, The case resolves itself into a single question, which it is for you to decide, viz., whether the

(a) *R. & M. Rep.* 249. See also *Walter v. Haynes*, *ib.* 149.

1836.


SIGGERS
v.
BROWN.

delay in receiving the notice arose from the fault of the present plaintiff, or was rather to be attributed to the carelessness of the defendant in not giving a more particular description of her residence. In regard to the case that had been cited (*Mann v. Moors*) I cannot help thinking that the rule said to have been laid down by Lord *Tenterden* is too general : a drawer may carry on so extensive a business in Manchester, as to be perfectly well known there, and easily found without specifying his abode more particularly ; but, on the other hand, the drawer may be so obscure an individual as to make it almost certain that a letter addressed to him generally, in a large town like London, or Manchester, will never reach him. It is said that the drawer may protect himself from this risk by stating his abode more particularly on the face of the bill, and that there is want of caution on his part, if he omit to do so. That is true ; but still it may be said, and perhaps with equal truth, that there is also some want of due caution on the part of an indorsee who takes a bill without enquiring who the previous parties to it are, and where they may be found. Upon the whole, therefore, it appears to me that the jury are in each case to determine whether the holder has, under all the circumstances, taken due and proper steps to forward his notice to the drawer, and if the notice miscarry, they are to decide whether the miscarriage arose from the fault of the holder, or of the person entitled to such notice. Here, it certainly appears that some enquiry was made by the plaintiff of the person from whom he took the bill as to the abode of the defendant—

either that person gave erroneous information, or the plaintiff (who made only a verbal enquiry) understood it incorrectly. You will say on the whole, whether you think the plaintiff took such steps as were reasonable and proper for the purpose of forwarding his notice to the defendant.

Verdict for the Plaintiff.(a)

Wightman for the plaintiff.

Erle for the defendant.

(a) See *Hewitt v. Thompson*, post, 546.

ADJOURNED SITTINGS IN THE COMMON PLEAS.

ATKINS and Another v. HUMPHREYS and Another.

WESTMINSTER,
Feb. 9.

THIS was an issue directed by the Court of Chancery, to try whether 10,000*l.*, the purchase money of an estate sold in 1818 to *Alexander Stewart*, was *bonâ fide* paid, or not.

The declaration set out the conveyance of the estates in question by *Mary Anne Tirel Morin* the elder, *Mary Anne Tirel Morin* the younger (daughter of *M. A. T. Morin* the elder), and *John Stewart* and *Selina* his wife (another daughter of the said *M. A. T. Morin* the elder), for the sum of 10,000*l.* to *Alexander Stewart*. The 10,000*l.* had in fact been paid at the time of the conveyance, but it was alleged that the whole transaction was fraudulent and collusive, in order to defeat a voluntary settlement made by *Mary Anne Tirel Morin* and her two daughters in favour of the de-

In an issue from Chancery between A. and B., depositions produced in Chancery by B., in a suit of C. against B., are inadmissible.

1836.

ATKINS
v.
HUMPHREYS.

defendants in this suit, the first of whom had married another daughter (since deceased) of the said *M. A. T. Morin*, and the other was their son. *John Stewart* and *Alexander Stewart*, were in partnership with *Archibald Campbell*; and it was alleged that in order to raise the 10,000*l.* for the purpose of the ostensible payment, *John Stewart* had advanced to *Alexander* certain partnership monies; and the partners having become bankrupt, the plaintiffs, their assignees, claimed a lien on the estates for the monies so applied. Soon after the conveyance, *Alexander Stewart* had instituted proceedings in Chancery against the present defendants, to set aside the voluntary conveyance to them as void against a *bonâ fide* purchaser.

Wilde Serjt. for the plaintiffs, proposed to read the deposition of Mrs. *Morin*, used by the defendants in the suit in Chancery of *Stewart* v. the present defendants.

Sir *F. Pollock* objected, that the deposition was inadmissible, inasmuch as the present plaintiffs were not identified with *Alexander Stewart*, the plaintiff in that suit, and could not be affected by those proceedings; the parties were not the same.

Wilde Serjt. The question in both cases is precisely the same. The defence then was, that the conveyance to *Alexander Stewart* was not *bonâ fide*, it was whether in fact he was the owner of the property, which is precisely the question here, and the deposition offered against these defendants was used by them in that suit.

TINDAL C. J. I incline to think I cannot receive the evidence. The parties are not the same, nor privies. There is no reciprocity. If the present defendants had offered depositions in that suit, the plaintiffs would have been entitled to object. The evidence must be rejected.

Verdict for the defendants.

Wilde Serjt., Sir *W. Follett*, and *Henderson*, for the plaintiffs.

Sir *F. Pollock*, *Dampier*, and *Ebden*, for the defendants.

1836.

 ATKINS
 v.
 HUMPHREYS.

SPRING ASSIZES. 6 W. IV.

DORCHESTER.
 Coram LITTLEDALE J.

DOE, dem. ELLIS v. HARDY.

DORCHESTER,
 March 12.

THE question in this ejectment was whether the lands sought to be recovered had passed by a codicil, said to be executed by Henry Sedcole, in 1821. The defence was, that the alleged codicil was a forgery. An admitted codicil, devising the property in question to the lessor of the plaintiff, dated in 1806, was put in, attested by only two witnesses, without objection, for the lessor of the plaintiff, and declarations of the testator of his intention that the lessor of the plaintiff should have the property were offered.

The declarations of a testator are admissible where a will is disputed on account of fraud, circumvention, or forgery.

These were objected to by *Butt* for the defendant.

1836.

ELLIS

v.

HARDY.

LITLEDALE J. I think the declarations of the testator are admissible to show his intentions, where the defence is either fraud, circumvention, or forgery.

Verdict for the plaintiff, with leave to the defendant to move on another point.

Erle and *Barstow* for the plaintiff.

Butt and *Fitzherbert* for the defendant.

YORK.

Coram PARKE B.

March 9.

REX v. BECKETT.

1. A wound incurred by the prosecutor in forcing part of his body, in self defence, against a weapon with which the prisoner was attacking him, is not a wound inflicted by the prisoner within the stat. 9 G. 4. c. 31. s. 11.
2. To constitute a wound, the external surface of the body must be divided.

THIS was an indictment against the prisoner for cutting, stabbing, and wounding the prosecutor upon the throat and hands, with intent to murder him.

It appeared that the prisoner attacked the prosecutor with a butcher's knife, and, drawing him backwards, attempted to cut his throat: an injury (which the prosecutor described as a slight scratch) was inflicted by the prisoner on the throat of the prosecutor; but the prosecutor succeeded in warding off further hurt, by lifting his two hands up to his throat, and in doing this the prosecutor said his hands struck against the knife and were cut.

PARKE B., upon this evidence being given, stopped the prosecution, saying, nothing which can be properly called a wound has been inflicted by the

prisoner in this case. A scratch is not a wound within the statute; there must at least be a division of the external surface of the body: the cuts on the hands are, indeed, wounds; but it appears that they were inflicted by the prosecutor himself in the attempt to defend himself from the prisoner's attack; those cuts, therefore, cannot be considered wounds inflicted by the prisoner with intent to murder or maim the prosecutor.

The prisoner was acquitted.

Wortley and Read for the prosecution.

Milner for the prisoner.

1836.

REX

v.

BECKETT.

FARRAR v. BESWICK.

LIVERPOOL.

April 1.

ACTION of trover for horses.

Pleas, 1st, That the horses were not the property of the plaintiff. 2dly. Judgment recovered in the county court by the defendant against *Joshua Farrar*, and that the defendant seized the horses, in the declaration mentioned, in execution of that judgment, they being the horses of the said *Joshua Farrar*.

Where two persons are in partnership, the presumption is that they are interested in the partnership stock in equal moieties.

For the defendant, evidence was given tending to shew either that *Joshua Farrar* (the brother of the plaintiff) was solely interested in the horses, or else that he was a partner with the plaintiff in the business of a carrier, and that the horses belonged to them jointly, and were used in their business.

1836.


FARRAR
v.
BESWICK.

PARKE B. told the jury, that if they thought the horses belonged to *Joshua* only, the defendant was clearly entitled to their verdict ; but if they thought *Joshua* was interested in the horses, not solely, but jointly with the plaintiff, he recommended them to find a verdict for the plaintiff, but to confine the damages to half the value of the horses ; and he would reserve the point for the opinion of the Court, whether the plaintiff was entitled to recover at all under such circumstances.

Cresswell observed, that there was no evidence to shew that *Joshua* was entitled to half of the stock in trade, even if the jury thought that he had some interest in it.

PARKE B. Where a partnership is found to exist between two persons, but no evidence is given to shew in what proportions the parties are interested, it is to be presumed that they are interested in equal moieties.

Verdict for the plaintiff, for half the value of the horses.

Cresswell and *Wightman* for the plaintiff.
Alexander and *Brandt* for the defendant.

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WALMESLEY v. BRIERLY and Others.

LIVERPOOL,
April 1.

ACTION on a bond.

Pleas, 1. *Non est factum*. 2. That the bond was obtained by fraud and covin.

The bond was conditioned for the payment of 600*l.*, and appeared to be stamped with only a 1*l.* stamp; but in the condition the sum of 600*l.* was declared to be the same sum of 600*l.* as was mentioned and secured to be paid by a certain indenture, bearing even date with this instrument, and made or expressed to be made by and between the parties to the bond.

The plaintiff's case being closed,

Alexander, for the defendants, objected that it was incumbent on the plaintiff to produce the deed referred to in the condition, for the purpose of shewing that it was such a deed as was charged with an *ad valorem* duty, so as to make the 1*l.* stamp on the present bond sufficient; and he cited *Wood v. Norton*. (a)

Where a bond is conditioned for the payment of money, which is declared to be the same money as that secured to be paid by an indenture of even date, it must, to dispense with an *ad valorem* stamp on such bond, appear by recital, or production of the indenture, that the latter was such an indenture as required an *ad valorem* stamp.

Cresswell contra. The language of the Stamp Act (55 G. 3. c. 184.) is, that it shall be sufficient to impress a 1*l.* stamp on the bond, if it be given to secure the same sum "as is in part secured by a mortgage, or wadset, or *other* instrument, hereinafter charged with the same duty as a mortgage, or wadset." Here, the condition describes the other

(a) 9. B. C. 885.

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deed as a deed by which the same sum is "*secured to be paid.*" Now, even if it be not fair to infer from the recital that the deed is a mortgage or wadset, still, as it is a deed "*securing payment of money,*" it must have been liable to an *ad valorem* duty, as all deeds for securing the payment of a gross sum are ; he referred to the exceptions under the title "*mortgage,*" in the schedule to the Stamp Act, as shewing that the intention of the legislature must have been to include under the class liable to the duty all instruments *not* so excepted. He referred to *Quin v. King (a)*, where the bond purported to be given as a collateral security to secure money according to a proviso in a deed of surrender, which deed of surrender was, nevertheless, not produced.

PARKE B. (after looking at the Stamp Act) said, If it had appeared from the recital in this bond that the other deed had fallen under the description of deeds subject to the *ad valorem* duty, the 1*l.* stamp would have been *primâ facie* sufficient. But the recital does not sufficiently shew that the deed was of that description ; it is not stated, nor can it necessarily be inferred, that it is a "mortgage, wadset, or other instrument thereafter charged with the same duty as a mortgage or wadset." It is not, therefore, like the case cited, because there the instrument appeared to be a *surrender*, which is one of the instruments made liable to the *ad valorem* duty. Here the deed may be a deed containing a mere covenant to pay, and I cannot find that such

(a) 1. *Mees. and Welsby.* 42

a deed would require the *ad valorem* stamp. I think, therefore, you must produce the deed, for the purpose of showing that it is a deed requiring an *ad valorem* stamp.

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Cresswell then produced the deed,

Verdict for the plaintiff.

Cresswell and *Tomlinson* for the plaintiff.

Alexander and *Brandt* for the defendant.

WHITWORTH v. CLIFTON, Esq.

April 4.

DECLARATION in trespass, *quare clausum fregit*, for taking the plaintiff's horse, &c.

Plea, That before the said time when, &c., to wit on, &c., one *James Plant*, assignee of the estate and effects of *James Butterworth*, a bankrupt, sued and prosecuted out of the Court of Exchequer at *Westminster* a *fi. fa.* directed to the chancellor of the county palatine of *Lancaster*, or his deputy there, whereby his Majesty commanded the said chancellor, that by his Majesty's writ, under the seal of the county palatine, &c. the said chancellor should command the sheriff that he should cause to be levied of the goods and chattels of the said plaintiff the sum of 168*l.* 3*s.* 6*d.*, which in his Majesty's Court of Exchequer was awarded to the said *James Plant*, assignee as aforesaid, for his damages which he had sustained on occasion of a certain grievance; that the said writ was in-

A sheriff, who executes a *fi. fa.* after notice that the defendant had obtained his discharge under the Insolvent Debtors' Act, 7 G. 4. c. 57., is not a trespasser.

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WHITWORTH
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dorsed to levy 168*l.* 3*s.* 6*d.*, and delivered to the chancellor; that the chancellor issued his command to the sheriff in pursuance of the writ, which was duly indorsed and delivered to the defendant, then being sheriff, to be executed, by virtue of which he entered and seized, &c.

Replication, That after the said sum of 168*l.* 3*s.* 6*d.* was awarded to the said *James Plant* for his damages, &c., to wit, on, &c., the said plaintiff was an insolvent debtor, and was in custody, and a prisoner in the King's Bench prison, at the suit of one *W. Lomas*, one of his creditors, within the meaning of a certain act of parliament passed 7 *Geo.* 4., intituled "An act for the relief, &c.;" that afterwards, and while the said plaintiff was in custody, to wit, on, &c., he applied by petition, &c. to the Court for Relief of Insolvent Debtors in *England* for his discharge, and duly executed a conveyance to the provisional assignee, &c.; that afterwards, to wit, on, &c., at and before the Court for Relief of Insolvent Debtors in *England*, held at, &c. and before the issuing of the *fi. fa.* or making of the mandate, the said petition and a certain schedule wherein the said *James Plant*, as assignee as aforesaid, was and is scheduled and set forth as a creditor of the said plaintiff, and wherein the said damages awarded to him as aforesaid were and are scheduled and set forth as an admitted debt from the plaintiff to the said *James Plant*, and the matters thereof, came on to be heard and were examined into before the said Court, and the plaintiff then applied to be discharged, &c., of all which said several premises the said *James*

Plant, as assignee as aforesaid, had due notice, as was and is required by law in that behalf, and the said Court did then adjudge the plaintiff to be discharged from custody, and to be entitled to the benefit of the said act, and the plaintiff was accordingly discharged; that the plaintiff executed the warrant of attorney directed by the Act to authorise the entering up of a judgment against him, &c. in the name of the provisional assignee for the amount of the debts stated in the schedule; that judgment was entered up on that warrant of attorney; and that afterwards, and after the plaintiff had executed the warrant of attorney, and after the adjudication of the plaintiff's discharge as aforesaid, and after the said judgment was entered up, and without any application to or leave from the said Court for the Relief of Insolvent Debtors, the said James Plant, assignee as aforesaid, sued and prosecuted out of the Court of Exchequer the said writ of fi. fa., and the mandate was thereupon afterwards made; and the plaintiff further saith that afterwards, with knowledge of the premises aforesaid, and after notice thereof to the defendant, he, the said defendant, executed the said mandate and committed the said trespasses: Averment, that the sum indorsed on the writ was the debt stated in the schedule to be due to the said James Plant, of all which the said James Plant, assignee as aforesaid, had notice at the time of issuing the writ, &c.

Demurrer, and joinder in demurrer.

PARKE B. called upon the plaintiff to support his replication.

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Hoggins, for the plaintiff. The sheriff is in this case a trespasser, inasmuch as he has taken upon himself to execute a writ issued in direct contravention of an act of parliament (61 sect. of 7 G. 4. c. 57.), he having at the time full knowledge of all the facts. Trover will lie against a sheriff who sells in execution of a judgment on a cognovit after notice that an assignment had been made to a provisional assignee between the seizure and sale. *Groves v. Cowham*. (a) [*Parke* B. There, the sale, which was the act of conversion, was after the change of property; the goods, therefore, were not liable to the sale.] If the sheriff, after notice of allowance of bail, executes a writ, he is a trespasser. (b) So, if the sheriff, after a secret act of bankruptcy, sell the goods of the bankrupt on an execution against him, he is a trespasser. *Balme v. Hutton*. (c) Here the strong point is, that the sheriff admits he had notice of the facts; and not only so, but that he had knowledge of them, which imports that he knew them to be true.


Wightman, contra. The sheriff has nothing to do but to obey the command of the court conveyed to him by the writ: for obeying that command he can never be a trespasser; and the utmost effect of his obeying it after notice of the irregularity would be, that possibly there might be some remedy against him by action on the case. In *Balme v. Hutton* the sheriff seized goods which turned out not to be the goods of the party against

(a) 10 Bing. p. 5.

(b) *Belshaw v. Marshall*, 1 Nev. & M. 689.

(c) 9 Bing. 471.

whom the execution issued ; the sheriff, therefore, disobeyed the writ, and was rightly deemed a trespasser. Would it be any answer for the sheriff to return to the court, that he had not obeyed their writ, because certain facts had been communicated to him showing that the court ought not to have issued such a writ? [*Parke B.* The allegation in the replication imputes that you not only had notice of the facts, but knew them to be true.] Be it so ; but is that an issue to which the sheriff should be exposed? The plaintiff was bound to take another remedy, and to apply to the court for a supersedeas ; and if the sheriff had then, in defiance of the supersedeas, proceeded in execution, he would have been a trespasser, because he would have acted after his warrant for acting had been revoked by the same authority which issued it. [*Parke B.* It was held in the Court of King's Bench soon after I took my seat there, that if a sheriff acts after notice of a writ of error, he is in fault, though no supersedeas had issued, because notice is equivalent to the supersedeas.] The allowance of the writ of error by the court is itself a revocation of the sheriff's authority ; but here, the court never interferes at all. Suppose a writ on mesne process to issue directing the sheriff to arrest a defendant, is the sheriff bound to disobey that writ because he believes that there is not in reality a good cause of action ?

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Hoggins's, in reply. There is no hardship on the sheriff, because he can have ample protection by applying to the court. If he prefers to act on his own responsibility, and chooses to assist the

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plaintiff by executing a writ which the legislature prohibits, and which is therefore to be deemed *no* writ at all, he is to be considered as a mere trespasser. The 57th and 58th sections of the act are strong to shew the clear intention of the legislature to relieve the insolvent from process of execution under such circumstances as the present.

PARKE B. It appears to me that the sheriff is justified in obeying the writ, which is not a void writ, but merely a writ which the plaintiff in execution was guilty of irregularity in issuing. The case differs entirely from all those where the sheriff sells after a change of property, because there he does *not* obey the writ. Here he has obeyed it; and that being so, I think that on principle he has a good defence; and the judgments of the majority of the learned Judges in *Tarlton v. Fisher* (a) support that opinion. There must, therefore, be

Judgment for the defendant.

(a) 2 Douglas, p. 671.

1836.

LEACH v. WILKINSON, HAMER, and Others.

April 7.

TRESPASS for an assault against four defendants.

Plea, not guilty.

On the part of the plaintiff evidence was given which, to a certain extent, implicated all the defendants.

The defendants' counsel addressed the jury, and evidence was then given which went clearly to entitle one of the defendants (*Hamer*) to an acquittal.

Upon this PARKE B. (having referred to a dictum of Lord *Tenterden* in *Carpenter v. Jones* (a), that it is in the discretion of the Judge to take an acquittal of one of several defendants *at any stage* of the cause) proposed to take the opinion of the jury in the first instance as to the case affecting *Hamer*; so that in the event of an acquittal, *he* might be called as a witness for the other defendants.

One defendant in trespass, against whom some *primâ facie* case has been made by the plaintiff, is not entitled to have his case put separately to the jury in order to his being acquitted and becoming a witness for the other defendants, however clear the exculpatory evidence on his part may be.

Cresswell objected to this course; and said the rule was, that if at the close of the plaintiff's case there was no evidence to affect one of several defendants, a verdict of acquittal might *then* be taken as against him, and he might be called as a witness for the other defendants; but if a *primâ facie* case were established by the plaintiff against *all* the defendants, and evidence was given on the

(a) M. & M. 198. n.

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part of the defendants, whatever its effect might be, the opinion of the jury must be taken at one time upon the whole case, and their opinion could not be asked upon the separate case of any one defendant; and he submitted, if this course should be departed from, that at all events he was entitled to address the jury in reply upon the case as affecting *Hamer*; and he suggested the great inconvenience of this course, as it might lead to several replies.

PARKE B. (having consulted Lord *Denman* C. J.) said, although in the present case it would be very desirable to have taken the opinion of the jury in the first instance upon the separate case of *Hamer*, still that Lord *Denman* and he felt it might lead in the case of several defendants to great inconvenience and confusion, inasmuch as it might be necessary to hear several replies; and they therefore did not feel justified in departing from the old practice.

Verdict of acquittal as to defendant *Hamer*, and for the plaintiff as to the other defendants.

Cresswell and *Crompton* for the plaintiff.
Alexander for the defendants.

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BURNE v. CAMBRIDGE.

DEBT on a demise for arrears of rent. The plaintiff (describing himself as surviving partner of *William Jackson*, deceased) declared, — For that whereas heretofore, to wit, on, &c. the said *Edward Burne* and *William Jackson*, being then seised in their demesne as of fee of and in a certain dwelling house, to wit, at &c., demised the same dwelling house and its appurtenances to the said *Artemas Cambridge*, for a certain term, to wit, the term of one year then next ensuing, and so from year to year, so long as he and they should please, yielding therefore, during such tenancy, to the said *Edward Burne* and *William Jackson*, a certain rent, to wit, the yearly rent of one hundred pounds, payable by two equal portions, to wit, on the first day of *August* and first day of *February* in every year, the first payment thereof to be made on the first day of *August* next after the commencement of such tenancy, by virtue of which demise the said *Artemas Cambridge*, to wit, on &c., entered &c., and was possessed &c., until the first day of *February*, 1835, when a great sum of money, to wit, 50*l.* of the rent aforesaid for the space of half a year then elapsed, and accruing and becoming due during such tenancy, but after the death of the said *William Jackson*, to wit, on the day and year last aforesaid, became and was due and payable from the said *Artemas* to the plaintiff, and still is unpaid, whereby an action hath accrued

To a declaration in debt for arrears of rent, stating that the plaintiff, and one J. S. deceased, were seised in fee, and demised to the defendant from year to year, rendering a certain rent to the plaintiff and J. S., which had fallen into arrear since the death of J. S., — it is a good plea, on general demurrer, that the plaintiff and J. S. were tenants in common.

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unto the plaintiff to demand from the defendant the last-mentioned sum, parcel of the sum above demanded; yet the defendant, although often requested, hath not paid the said sum or any part thereof, to the plaintiff's damage of five pounds, and therefore he brings suit.

Plea, That the said plaintiff and the said *William Jackson*, before and at the time of the said demise, were seised in their demesne as of fee of and in the said dwelling house, with the appurtenances, as tenants in common, and not as joint tenants; and that from the time of the making the said demise continually until and at the time of the death of the said *William Jackson*, they the said plaintiff and *William Jackson* were seised as of fee of and in the reversion of the said dwelling house and the appurtenances expectant upon the determination of the said demise to the said defendant; and defendant further saith, that the said *William Jackson* died before the said rent in the said declaration demanded, or any part thereof, accrued or became due, to wit, on &c., and the defendant further says, that the interest, share and estate of the said *William Jackson* in the said dwelling house and the appurtenances did not, nor did any part of it, ever come to or vest in the plaintiff, either as heir, devisee, or otherwise howsoever; and this, &c.

General demurrer, and joinder in demurrer.

The case was argued after the circuit, at Serjeant's Inn, before Lord *Denman* C. J. and *Parke*, B., by *Cowling*, for the plaintiff, and by *Crompton*, for the defendant.

Cur. adv. vult.

In the course of *Hilary* term 1837, judgment was delivered by Lord DENMAN C. J. as follows :

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This case was argued some time ago, and stood over for further consideration. The declaration was in debt: it stated that the plaintiff and *Jackson*, since deceased, were seised in fee of a dwelling house, and demised it to the defendant from year to year, yielding and paying to the plaintiff and *Jackson* 100*l.*, payable half-yearly, and that half a year's rent accruing due after the death of *Jackson* was unpaid.

To this declaration there was a plea, stating that the plaintiff and *Jackson* were tenants in common of the demised premises, and not joint-tenants; and that the share of *Jackson* never vested in the plaintiff as heir, devisee, or otherwise. To this plea there was a general demurrer and joinder. We are of opinion that the defendant is entitled to our judgment.

As the declaration alleges that the plaintiff and *Jackson* were seised of the entirety of the dwelling house, and demised it, such allegation must be taken to be of the legal effect of the lease, and therefore cannot be true, unless the plaintiff and *Jackson* were joint-tenants or coparceners; for a joint demise by deed; so as to operate by estoppel, is out of the question. If the plaintiff and *Jackson* were tenants in common, they could not demise the entirety by a joint demise; a point settled in the case of *Doe d. Poole v. Errington* (1 Adol. & Ell. 750., 3 N. & Man. 646.), to which last-mentioned report the editors have appended a very able note on this subject. A lease by tenants in

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common operates as a demise of their separate moieties ; but the plea states, and it is admitted by the demurrer, that the plaintiff and *Jackson* were tenants in common, and consequently the declaration is disproved. In truth the plea, though pleaded by way of confession and avoidance, amounts to the general issue ; but not having been specially demurred to, that objection could not prevail. *Parsons v. Bickmead*. (a) For this reason the plaintiff cannot recover in this action, which is founded on a joint demise by joint-tenants. We need not inquire whether he ought not, in an action of debt by himself alone, to recover for a moiety of the whole rent, according to the opinion of Lord *Holt* in *Midgley v. Lovelace* (b), as he might in a joint action at the suit of himself and his co-tenant in common, as seems to follow from Litt, sect. 316. ; nor do we decide any thing against his title to recover as surviving lessor, if there had been, as there was in the case of *Wallace v. M'Laren* (c), cited at the bar, a covenant by the lessee with the two lessors jointly to pay the reserved rent, and the action had been brought on that covenant. Our judgment must be for the defendant.

Judgment for the defendant.

(a) 1 Shower's R. 76.
 (b) Carth. 289.

(c) 1 Mann. & Ry. 516.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN THE COURT OF EXCHEQUER,
AT THE SITTINGS AFTER
TRINITY TERM,
7 W. IV. 1836.

ADJOURNED SITTINGS IN THE EXCHEQUER.

HEWITT v. THOMSON.

1836.

GUILDHALL,
June 24.

ASSUMPSIT against the drawer of a bill of exchange.

The bill was dated "3. Wilton Street, 30 November 1835," and purported to be drawn by "Chas. Thomson," and to have been accepted by one John Johnson, payable to the drawer's order; by him indorsed to I. R. Nicolls, who indorsed it to the plaintiff.

Plea, That the defendant had not notice of the dishonour, and issue thereon.

It appeared in evidence that when the bill was returned unpaid to the plaintiff as indorser, on the 7th March 1836, his attorneys wrote a letter containing notice of the dishonour, and put the same into the twopenny post; but mis-reading the drawer's surname for "Thornton," instead of

Where notice of dishonour reaches the drawer of a bill too late, having first by mistake been sent to a wrong person, and such mistake arose from the indistinctness of the drawer's writing on the bill, he is not discharged.

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“*Thomson*,” they directed their letter “to C. *Thornton*, Esq., No. 3. *Wilton Street*.” The defendant had ceased to reside at that place before the bill became due, and the letter was returned to the attorneys of the plaintiff on the 10th of *March*, from the Dead Letter Office, with an intimation that no such person as Mr. *Thornton* was known at No 3. *Wilton Street*, whereupon the attorneys on the same day, having made inquiries who the defendant was, and having ascertained his present residence, addressed a notice to him in his right name at that residence. The postman who had the delivery of letters in *Wilton Street* on the 7th, was called and said that being informed there was no such person as Mr. *Thornton* living at No. 3. he returned the letter to the head office, without making any further inquiry. It was contended for the defendant that no notice of dishonour had been given to him until the 10th of *March*, which was clearly too late.

PARKE B. told the jury, that it was clear the defendant had not received notice within the time limited by the ordinary rule, and that it was fit they should watch very closely any evidence adduced for the purpose of taking any particular case out of that rule. The notice ought to have been given on the 7th. In fact it did not reach the defendant until the 10th; and the question for the jury was, whether sending the letter on the 7th to the residence occupied by the defendant when the bill was drawn by him, and with the error that had been proved to exist in the defendant's name upon the address of the letter, was a sufficient

notice? They would look at the bill and examine the defendant's signature thereto, and then say whether the mistake in the address was attributable to the want of proper care on the part of the plaintiff or his attorneys, or whether it might more reasonably be said to result from the defendant's own manner of writing his name in the bill. If they were of the latter opinion, their verdict would be for the plaintiff.

Verdict for the plaintiff.

Erle and Welsby for the plaintiff.

Kelly and R. Gurney for the defendant.

(a) See *Siggers v. Brown*, *sup.* p. 520.

SUMMER ASSIZES, 7 W. IV.

BRISTOL.

Coram ALDERSON B.

IVEY v. YOUNG.

August 15.

ASSUMPSIT.

The declaration alleged a contract by the defendant to deliver certain crate poles at one shilling and sixpence per dozen, to be paid for on delivery. Breach, by non-delivery.

Plea Non Assumpsit.

The contract proved was for the delivery of poles, to be paid for on delivery in cash, with *five per cent. discount*. It was also proved that part of the poles had been delivered, but not paid for; and

An amendment of a declaration will not be allowed under 5 & 4. *W. 4. c. 42. s. 23.* if it appears probable that the variance may have prevented the defendant from pleading a good bar to the action.

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1836. that subsequently another part of the poles had
IVEY been tendered to the plaintiff, but rejected by him.
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Bompas, Serjt. contended that there was a fatal variance in setting out the contract in the declaration, by reason of the omission of the stipulation as to discount.

Crowder for the plaintiff, submitted that the contract was stated in the declaration with sufficient accuracy; for it was stated that the poles were to be paid for on delivery, and the deduction of five per cent. discount was not material.

ALDERSON B. held the variance fatal.

Crowder then applied for leave to amend, under 3 & 4 W. 4. c. 42. s. 23.

Bompas Serjt. resisted the application. If the contract had been properly set out, the defendant would have pleaded that the plaintiff refused to pay on the first part delivery, and that thereupon the defendant rescinded the contract.

ALDERSON B. It is possible that such a plea would have been an answer to the action; and if so, the defendant may have been prejudiced by the contract not having been properly stated. Before I can consent to allow the amendment, I must be clearly satisfied that the defendant has not been prejudiced. Let the case go on for the present; and if the defendant can, by cross examining the plaintiff's witnesses, make it appear probable that

he could establish the facts suggested by him, as a defence, I shall refuse the amendment.

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v.

YOUNG.

The case, thereupon, proceeded, and it appeared that the plaintiff had refused to pay for the poles till the whole were delivered; but nothing being elicited to show that the defendant rescinded the contract on that ground, *Alderson B.* allowed the amendment.

Verdict for the plaintiff.

Crowder for the plaintiff.

Bompas Serjt. and *Butt* for the defendant.

YORK.

Coram PARKE B.

DOE on the demise of JOHN H. BLACKBURN
v. W. BLACKBURN.

July 14.

EJECTMENT.

It appeared that in 1808 a person named *George Newbald*, a foundling in the village of *Newbald*, purchased the property in dispute; having previously married *Mary Jackson*, a widow, whose maiden name had been *Blackburn*, and by whom he had one son, *George Newbald* the younger. He died in 1815 intestate, leaving his wife and his son, *George Newbald* the younger, his survivors. His widow died shortly afterwards, and his son entered into possession of the property, as his father's heir-at-law.

Where land descends to the son of an illegitimate father, who is proved to have been the purchaser thereof, and the son dies seised, intestate, and without issue, such land does not devolve upon his heirs *ex parte materna*, but escheats to the

Crown, notwithstanding the stat 3 & 4. W. 4. c. 106. s. 2.

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The son never married, and died seised, in *March* 1834, intestate. Upon his death the defendant took possession of the property, and continued in possession up to the trial. The lessor of the plaintiff claimed as heir-at-law of the younger *Newbald*, viz., as grandson of one *Jacob Blackburn*, who was the eldest brother of *Mary*, the wife of the foundling, and mother of the younger *Newbald*.

Cresswell and *S. Temple*, for the defendant, contended, that, as it appeared from the plaintiff's own case that *George Newbald* the elder was illegitimate, that he was the purchaser, and that his son took the property by inheritance, it would, by virtue of the 3 & 4 *W. 4. c. 106. s. 2.*, escheat; for by that section it is provided, that in future descents shall be traced from the purchaser, and not from the person last seised. There is, indeed, a provision that the last proprietor shall be considered the purchaser, unless it be proved that he inherited: but here the lessor of the plaintiff has proved or admitted that fact. Tracing, then, the descent from the purchaser, viz: from *George Newbald* the elder, it is clear that neither *J. H. Blackburn*, the lessor of the plaintiff, nor *W. Blackburn*, the defendant, is his heir-at-law; and the latter being in possession, the former cannot recover in this action.

PARKE B. was of that opinion: His Lordship said that such a result could hardly have been contemplated by the framers of the act; but he did not see how the words of the second section could be got over.

Nonsuit. (a)

Alexander and Wightman for the plaintiff.
Cresswell and Temple for the defendant.

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(a) It is apprehended that the land would have escheated to the crown, at common law: (see *Litt. s. 4.* and the case cited from the *Hale MSS.* by Mr. *Hargreave*, Co. *Litt.* 12. a. n. 5) but it is certainly a little singular that the second section seems to have been introduced into this statute partly for the purpose of preventing an escheat, under circumstances like the above, and yet has not accomplished the object. The Real Property Commissioners in their report say, "We further think that the last proprietor may be treated as if he had been the first purchaser, in the *rare case* in which the line, from which the estate descended to the last proprietor, has failed, for the purpose of admitting to the inheritance his other relations, *rather than let it escheat*. It may seem superfluous to legislate for cases like these, which may appear very unlikely to occur in practice; they are, however, found to occur *in consequence of the acquisition of estates by persons of illegitimate birth*," &c. In order to effect the object of the commissioners, there should, perhaps, have been a provision that in cases where the line of the first purchaser was extinct, the descent might be traced from the person last seised.

Coram COLERIDGE J.

REX v. WOODHEAD and Another.

July 16.

THE prisoners were indicted under the statute 7 & 8 G. 4. c. 30. s. 3. The 1st count of the indictment, charged them with having unlawfully, maliciously, and wilfully damaged 100 yards of worsted stuff "in a certain process of manufacture," with intent to destroy the same. There were also counts stating the goods to brought into a condition fit for sale.

Goods remain in "a stage, process, or progress of manufacture," within the meaning of 7 & 8 G. 4. c. 30. s. 3. though the texture be complete, if they be not yet

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be “in a certain stage of manufacture,” and other counts described the goods as being “in the progress of manufacture.”

The prosecutors were dyers, and received the stuffs from the manufacturer after the texture was complete, but while they were still in an un-marketable state. The stuffs which were damaged by the prisoners were, at that time, upon rollers, immersed in liquid and in the actual process of being dyed ; and the injury was done by throwing deleterious ingredients upon the stuffs themselves, and into the liquid in which they were immersed.

For the prisoners, it was contended that, as the article damaged was, at the time of the damage being done, in a complete state, so far as the manufacturing and texture were concerned, and only required *dyeing* to fit it for the market, the case did not come within the words of the act.

Baines and *Wortley*, for the prosecution, submitted that the legislature could not have intended to withdraw the protection of the act, until the manufacture was so complete that the articles were fit for immediate sale.

COLERIDGE J. (after consulting with PARKE B.) said that they were both of opinion that the true construction of the act was that contended for by the prosecutor; he, therefore, over-ruled the objection, and he referred to the provision in the same section relating to goods on “the rack or tenters” (*a*)

(*a*) The “rack or tenters” are frames in the open air, on which the stuffs, &c. are stretched after they are manufactured and dyed.

as shewing that the act contemplated injuries to goods subsequent to the completion of the texture.

Verdict, guilty.

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Baines and Wortley for the prosecution.

Sir *G. Lewin* for the prisoner *Woodhead*.

July 18.

REX v. SCAIFE.

Dying declarations in favour of the party charged with the death are admissible in evidence.

THE prisoner was indicted for manslaughter.

It appeared in evidence that the prisoner and the deceased were drinking together at a public house, when a quarrel took place between them ; in the course of which the deceased said to the prisoner, “What did thy father do with that hay which he took out of a barn one night?” the prisoner said “Do’st thou mean to say my father stole hay?” and then immediately went up to the deceased, knocked him down, and kicked him on the belly, thereby causing his death.

A surgeon was called to give evidence as to the cause of death, and stated that he found the deceased in a state from which he could not by possibility recover, and that he told him so ; and that the deceased seemed perfectly sensible of the dangerous state he was in, and said he knew he could not get better. That the deceased afterwards said to the witness, “I don’t think he would have struck me if I had not provoked him.”

COLERIDGE J. at first expressed some doubt whether he ought to receive this statement, and

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asked the counsel for the prisoner if they could refer him to any case where the declarations of a dying man *in favour* of a prisoner had been received in evidence?

Greenwood and *Wortley*, for the prisoner, replied that they had searched for such a case, but had not found any: but they submitted that on principle *all* that a dying man says, whether for or against the prisoner, is evidence; the reason for receiving such evidence being, that where a man knows that he is on the verge of a future state, he has every possible inducement to speak the truth and the truth only.

COLERIDGE J. received the evidence; observing that it might have an influence on the amount of punishment.

Verdict, guilty.

Baines and *D. Maude* for the prosecution.
Greenwood and *Wortley* for the prisoner.

NORTHUMBERLAND.

Coram PARKE B.

July 28.

SPENCER v. DAWSON.

The plea of not guilty to an action on the case for a deceitful warranty of soundness, puts in issue both the warranty and the unsoundness.

CASE for deceit in the warranty of a horse.
Plea, not guilty.

PARKE. B held, that under the new rules (Hilary Term, 4 W. 4. iv.) the plea put in issue both the warranty and the unsoundness — in short, the whole

declaration except the bargain and sale, which were matter of inducement.

Verdict for the plaintiff.

Cresswell and W. H. Watson for the plaintiff.
Alexander and Wightman for the defendant.

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SPENCER
v.
DAWSON.

IN THE COURT OF COMMON PLEAS AT
LANCASTER.

Coram GURNEY B.

DOE on the Demise of CHADWICK v.
JACKSON.

LANCASTER.
Aug. 14.
1834.(a)

THIS was an action of ejectment, tried at the Summer assizes, in the year 1834, for the county of *Lancaster*, when a verdict was found for the lessor of the plaintiff, subject to a special case, the facts of which were, in substance, as follow : —


By an indenture, bearing date the 20th of April, 1731, made between *Adam Holden* and *Elizabeth*, his wife, of the first part; *Adam Scholefield* and *Hannah* his wife, of the second part; *James Ashworth* and *Alice* his wife, of the third part; *John Taylor* and *Judith* his wife, of the fourth part;

By deed between coparceners and their husbands to lead the uses of a fine, in order to effect a partition,—the share of one coparcener was limited (after life estates to the parents) “to the use of the child or children” (without words of in-

heritance) “for ever, subject nevertheless to such divisions, directions, orders, and appointments as the husband by will or deed should think fit to direct or appoint.” Held, that these words gave the husband not merely a power of distribution, but a general power to appoint the fee-simple, and that such power was well executed by indentures of lease and release expressed to be made in consideration of money paid, as well as of natural affection.

(a) Judgment was not given in this case until Hilary Term, 1837.

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*James Hoyle, of Hole Bottom, in Spotland, and Mary, his wife, of the fifth part; and James Hoyle, of Stubby Lee, in Spotland, of the sixth part; (which said Elizabeth, Hannah, Alice, Judith, and Mary, were therein described as the only daughters and co-heirs of James Hoyle, deceased,) after reciting that the messuages, lands, and hereditaments of the said James Hoyle, deceased, descended and came by due course of law unto the said Elizabeth, Hannah, Alice, Judith, and Mary, and their heirs, as the only daughters and co-heirs of the said James Hoyle deceased, who, together with their respective husbands were willing and desirous that a full and perfect division, partition, and allotment of all and every the said messuages, lands, and hereditaments might be had, made, and divided into four equal parts, shares, and allotments, so that all parties and persons might have, hold, and enjoy their respective shares, parts, divisions, and allotments in severalty to them and their heirs respectively from the other, according to the several uses, estates, limitations, provisions, and purposes thereafter particularly mentioned, limited, expressed, and declared; it was to that end covenanted, &c. by and between all the said parties, that the said James Hoyle and Mary his wife, should accept 40*l.*, paid by Adam Holden, Adam Scholefield, James Ashworth, and John Taylor, in full satisfaction of the estate, &c., which the said James Hoyle, or Mary his wife, or their heirs, &c. could or might have or claim of, in, to, and out, and forth of the same; and that the said James Ashworth and Alice, his wife, should have, hold, and enjoy according to the several uses, estates, provisions, limitations, and*

purposes thereafter mentioned, expressed and declared, certain lands and hereditaments therein specified (being the property in question in this cause), which it was thereby agreed should be the full share, dividend, part, and allotment of the said *James Ashworth* and *Alice* his wife, of, in, to, or out of all and every the messuages, lands, and hereditaments aforesaid, late the estate and inheritance of the said *James Hoyle*, deceased, and which the said *James Ashworth* and *Alice*, his wife, had agreed to accept and take in full for their respective shares, dividends, parts, and allotments accordingly, they paying one fourth of the said 40*l.* to the said *James Hoyle* and *Mary* his wife, and 5*l.* to the said *Adam Scholefield*. The indenture contained a similar declaration as to shares allotted to *Adam Holden* and *Elizabeth* his wife, *John Taylor* and *Judith* his wife, and *Adam Scholefield* and *Hannah* his wife. It was then covenanted by all the said parties that a fine should be levied of the messuages, lands, and hereditaments, aforesaid, late the estate and inheritance of the said *James Hoyle* deceased; and the uses of the fine were declared (as to all the shares except *Ashworth's*) in favour of the respective parties above named, in fee-simple, some being limited to the husbands and their heirs, others to the wives and their heirs,—and as to the share of *James Ashworth* and his wife, it was declared that the fine should enure to the use and behoof of the said *James Ashworth* and his assigns, for and during the term of his natural life; and immediately after his decease, for the annual payment of 6*l.* to be paid to the said *Alice*, then wife of the said *James*

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Ashworth, and her assigns, for and during the term of her natural life, in case she should happen him to survive, out of the rents and profits thereof, and the reversion and remainder thereof, *to the use and behoof of such child or children as was or should be begotten by the said James Ashworth on her the said Alice his then wife for ever, subject nevertheless to such divisions, directions, orders, and appointments as the said James Ashworth by his last will and testament, or other his act and deed in writing by him in his lifetime, under his hand and seal lawfully executed, should think fit to direct and appoint.*


A fine with proclamations was duly levied according to the covenant.

James Ashworth entered into possession of the estate agreed to be allotted to him as aforesaid, (being the premises in question in this cause), and died in possession thereof about fifty years ago.

The said *James Ashworth* had only two children by the said *Alice* his wife, both born after the execution of the deed of partition and the levying the fine, and whilst the said *James Ashworth* was in possession of the said allotted estate, viz. *James Ashworth*, his son, who died in 1764, in his father's lifetime, and *Ann*, who intermarried first with *John Heyworth*, and afterwards with *Jonathan Greenwood*.

By indentures of lease and release, bearing date respectively the 19th and 20th *December*, 1768, made between the said *James Ashworth* (the father) of the one part, and the said *Ann* (therein described as *Ann Heyworth*, widow of *John Heyworth*) his daughter, of the other part, the said *James Ash-*

worth, in consideration of the sum of 50*l.* paid to him by the said *Ann Heyworth*, and of natural love and affection, &c., granted, bargained, released, &c., unto the said *Ann Heyworth*, her heirs and assigns, the said messuages and lands so agreed to be allotted to the said *James Ashworth* and *Alice* his wife, as above-mentioned (being the premises in question in this cause), and the reversion, &c., and all the estate, right, &c. of the said *James Ashworth*, &c., to and for the sole and only use and behoof of the said *Ann Heyworth*, her heirs and assigns for ever.

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Ann Heyworth entered upon the premises, and died in possession thereof in 1833.

The defendants were devisees under the will of the said *Ann Heyworth*.

The lessor of the plaintiff was heir-at-law of the said *Alice*, the wife of the said *James Ashworth*.

The question for the opinion of the Court was, whether the lessor of the plaintiff was entitled to recover the whole, or any, and what, portion of the premises in question.

The case was argued, in Trinity Term, 1836, at Serjeant's Inn, before Lord DENMAN, C. J., and Mr. Baron PARKE (the Judges in the commission for the county palatine, at the time of the argument), by *Tomlinson*, for the lessor of the plaintiff, and by *Hoggins*, for the defendant.

Cur. adv. vult.

In the course of *Hilary* term 1837, the following judgment was delivered, by Lord DENMAN C. J.

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This case was very ably argued before us some time ago, and stood over for our decision. The question turned on the construction of a power of appointment in a deed to lead the uses of a fine; and upon the execution of that power. The lessor of the plaintiff claiming, in the event of there being no power of appointment of a fee-simple, or of such power not having been duly exercised, either one fifth or the whole of the estate, as the heir-at-law of one of the settlors.

Five sisters being entitled to different interests in an estate, and all married, executed a deed of covenant to levy a fine of the whole, on the 20th of *April* 1731, and declared the uses of the fine. By this deed the estate was divided into shares, and it was declared that *James Ashworth* and *Alice* his wife, one of the daughters, (under whom the lessor of the plaintiff claims as heir-at-law) according to the several estates, limitations, provisions, and purposes thereafter mentioned were to hold and enjoy certain lands, as their full part, share, and allotment, and the uses of the fine, as to such part, were declared as follows:—“ And as for touching and concerning all the dividend, share, part, and allotment of the said premises, shared and allotted to the said *James Ashworth* and *Alice* his wife as aforesaid, to the use and behoof of the said *James Ashworth* and his assigns, for and during the term of his natural life, and immediately after his decease for the annual payment of 6*l.* to be paid to the said *Alice* then wife of the said *James Ashworth* and her assigns for and during the term of her natural life, in case she should happen him to


survive, out of the rents and profits thereof, and the reversion and remainder thereof, to the use and behoof of such child or children as was or should be begotten by the said *James Ashworth*, on her the said *Alice* his then wife for ever; subject nevertheless to such *divisions, directions, orders* and *appointments* as the said *James Ashworth* by his last will and testament or other his act and deed in writing by him in his lifetime under his hand and seal lawfully executed, should think fit to direct and appoint." — A fine was afterwards levied. *James Ashworth* in 1768, in consideration of 50*l.*, conveyed the lands constituting the share of his wife, to his daughter *Anne Heyworth* in fee. *Alice Ashworth* we suppose died before this; but the time of her death, indeed the fact of her death, is not stated. The Defendants claim as devisees under the will of *Anne Heyworth*.

The first question upon these facts is, whether the words of the deed of 1731 authorised an appointment by *James Ashworth* to his daughter in fee. It is perfectly well settled, that no precise form of words is necessary to create powers, which are but declarations of trusts, whether such powers are given by will or deed. (*Moore*, Anon. 608.) And where the intention is clear, a power may enable the disposition of a fee, though no words of limitation are used. Do, then, the words in this case sufficiently indicate the intention of the settlors that a fee should be appointed? We think it clear that if the words had been that the reversion and remainder should go to such uses as *J. A.* should direct, order, or appoint, a fee could have been appointed to any one; and the cases fully warrant

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that opinion ; thus in *Leife v. Saltingstone*, 1 Mod. 189., Anon : Cart : R : 232., the words “ by her to be *disposed* of to such of my children as she shall think fit,” were held by a majority of the Judges to authorise an appointment of the fee, and they said that when one gives to another a power to dispose, he gives the same power that he himself had. In *Tomlinson v. Dighton*, 1 P. Williams, 149., no doubt was entertained as to this point ; where a will devised lands to the testator’s wife for life, and then to be at her *disposal*. And in *Kenworthy v. Bate*, 6 Ves. jun. 793., Sir *Wm. Grant* was of opinion that a settlement “ to the use of such child and children as *J. S.* should by his will direct, limit, and appoint,” authorised *J. S.* to give a fee simple to any one of his children. Sir *E. Sugden*, in remarking upon this case, observes, that the context might be considered as shewing an intent to vest the inheritance in the children, because there were limitations, in default of appointment, to the “ *sons in tail*.” There is some difficulty, however, in saying that such an intent could be collected from the context, as an estate tail differs from an estate in fee ; and the Master of the Rolls must have founded his opinion on the general effect of the word “ appoint-ment,” without any words of qualification. We are of opinion, therefore, that the words “ subject to such directions, orders, and appointment,” as *J. Askworth*, &c. should think fit to direct and appoint, would clearly authorise him to appoint an estate in fee simple, unless controlled by the context.

But it is argued that, looking at the context, the power is one of division or distribution only

of life estates between the children; that for want of words of inheritance, estates for life only are given to the children, and these estates alone (it is said) are meant to be operated upon by the power.

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It must be admitted that the language of the deed is in this respect somewhat obscure; but we are of opinion upon the true construction of the clause, that the power given to *J. Ashworth* is not one of distribution merely, but a general power of appointment, under which he might appoint the reversion, subject to his own and his wife's life estate, *to any one for any estate*.

This construction we think gives effect to all the words in the sentence, whereas that contended for by the lessor of the plaintiff does not attribute full force to the latter expressions; to none, in truth but the word "divisions."

We think the meaning of the sentence is this: that the reversion and remainder is to go to the child and children as joint tenants (for want of words of inheritance) for life only; but this limitation in favor of the children jointly is nevertheless subject to, that is, is liable to be affected, controlled or altered by, and must give way to, any direction that *J. Ashworth* may give, as to the division of that estate, or any other division, order, or appointment. The effect is the same as if the reversion and remainder had been limited to such uses as *J. Ashworth* should by deed or will appoint, and in default, to the children as joint tenants for life: and the limitation is not equivalent to a limitation to the children of the marriage for life, in such parts, shares, and proportions, and subject to such

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conditions or limitations as *J. Ashworth* should by deed or will appoint.

The only remaining question is whether this power was executed by the indentures of lease and release of 1768.

Of this there is no doubt : for *James Ashworth* had no interest in the fee, and could not dispose of it except by virtue of the power.

No objection can arise, on our construction of the power, from the circumstance that money was given by *Ann Heyworth* to her father; and indeed, if it had been a power to be exercised for the benefit of a child or children only, this would not have been an objection at law, or in equity, if the price paid was referable to the life estate of *James Ashworth*, of which the deed operated as a conveyance, as it also operated as an appointment of the reversion in fee.

Judgment for the defendant.

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The defendant's admission of something being due, without specifying how much, does not entitle the plaintiff to a verdict for nominal damages on an account stated; on that count the amount must be shown. *Kirton v. Wood*,
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Goods of an intestate taken possession of and used by an administrator in the house of the intestate, for three months after the death of the intestate, cannot be taken in execution for the administrator's own debt. *Gaskell v. Marshall*,
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ASSOCIATION, ILLEGAL.

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy (unless expressly declared by some act of parliament to be legal), for whatever purpose or object it may be formed; and the administering an oath not to reveal any thing done in such association, is an offence within the 37 G. 3. c. 123. § 1. The enacting part of 37 G. 3. is not restrained by the preamble.

The precise form in which the oath is administered is not material; it is an oath within the meaning of the act, if it was understood by the party tendering and by the party taking it, as having the force and obligation of an oath. *Rex v. Loveless and others*, Page 349

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1. An attorney who receives a deed from his client, and is compelled to produce it by commissioners of bankrupt, and afterwards receives it back from them under an undertaking to produce it again if required, may nevertheless refuse to produce it in an action brought by the assignees of the bankrupt under whose commission he was compelled to produce it. *Nixon and another v. Mayoh*, 76

2. The attorney for the opposite party cannot be asked whether he has with him a rule of court relating to the cause, with a view to give secondary evidence of the rule, no notice to produce or *sub-pœnâ duces tecum* having been served. It is too late at the trial to serve such notice. *Cook v. Hearn*, Page 201

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Where several attorneys were in partnership, but one of them only had been admitted on the rolls of the palace court, Held that an action could not be sustained by all the partners for business done in that court, although there had been an express promise to pay them. *Arden and two others v. Tucker*, 191

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3. An attorney's bill cannot be recovered on an *account stated*, though the amount has been admitted, without proof of the delivery of his bill. *Eicke, gent. one, &c. v. Nokes*, 359

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An author may maintain an action for injury to his reputation against the publisher of an inaccurate edition of his work, falsely purporting to be executed by him, though the publisher be the owner of the copyright. *Archbold v. Sweet*, Page 162

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Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment to one of those persons, without authority of the others. *Innes, Surviving Assignee, &c. v. Stephenson*, 145

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Where the husband has had opportunities of access to his wife at a period which admits of his having then begotten the child born of her, he is presumed to have done so. But that presumption may be rebutted by strong circumstances to shew that the husband did not have sexual intercourse with his wife. *Cope v. Cope*, Page 269

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

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1. Presentment of a bill at half-past seven P. M. at a dwelling-house, where it is made payable, is sufficient.

Proof that the drawer of a bill knew, two days after its maturity, that it was unpaid and in the hands of a particular indorsee, and objected to pay it on the ground of fraud in the obtaining of it, is evidence to go to the jury that he had received regular notice of dishonour. *Wilkins and another v. Jadis*, 41

2. One of the makers of a joint promissory note may shew that he was a mere surety for the other party, and so known to the plaintiff, the payee of the note, and that the plaintiff has taken a composition from the principal debtor. *Hall v. Wilcox*, 58

3. An unsigned acceptance written on the face of a bill of exchange is not made invalid by statute 1 & 2 G. 4. c. 78. s. 2.; but it is

- a question for the jury whether it was intended to operate in its present form, or to be subsequently completed by signature. *Dufaur v. Oxenden*, Page 90
4. An acceptance in blank is sufficient to charge the acceptor where the bill is afterwards drawn in pursuance of his authority. The 1 & 2 G. 4. c. 78. s. 2. does not affect such acceptances. *Leslie v. Hastings*, 119
 5. The declarations of the indorser of a bill, made whilst he was holder, are evidence to go to the jury against a holder under an indorsement made before the bill was due, if there be evidence which satisfies the judge that the indorsee is merely an agent to sue for the indorser; the jury are afterwards to judge, first of the agency, and then of the effect of the declarations. *Welstead v. Levy*, 138
 6. An instrument in the following form: "On demand I promise to pay, &c.," addressed to the defendant and accepted by him, may be declared on as a promissory note. *Block and another v. Bell*, 149
 7. Where the buyer of goods hands over to the seller the promissory note of a third party, without indorsing it: held, that in an action for the price of the goods the plaintiff need not prove presentment of the promissory note to the maker. *Goodwin v. Coates*, 221
 8. The acceptance by a creditor of a check in his favour drawn by his debtor operates as payment, unless dishonoured. The mere fact of a person's drawing such a check in favour of another is not evidence of a debt. *Pearce v. Davis*, 365
 9. In an action by an indorsee against the acceptor of a bill of exchange, the mere absence of consideration for the acceptance and prior indorsements does not throw the *onus* on the plaintiff of proving the consideration for the indorsement to him where no circumstances of fraud or illegality appear. *Whittaker v. Edmunds*, Page 366
 10. When the acceptor of a bill of exchange pleads that it was accepted without any consideration, and the plaintiff replies that it was accepted for a good consideration, the *onus* of proof lies on the defendant to shew the want of consideration. *Secus*, where the plaintiff in his replication specifies the particular sort of consideration for which he alleges the bill was accepted. *Batley and another v. Catteral and another*, 379
 11. An alteration of a general acceptance of a bill, by the addition of a place of payment, discharges the acceptor, if made without his privity. *Desbrowe v. Wetherby*, 438
 12. The fact of a bill having been accepted to raise money for the acceptor, and of the payee having appropriated the money so raised to his own use, is not sufficient to call upon a subsequent indorsee to shew that he gave value for the bill. *Jacob v. Sir W. Hungate*, 445
 13. On a plea that "the defendant did not make the promissory note mentioned in the declaration," he cannot give evidence that he was of imbecile mind at the time when he made it. *Harrison v. Richardson*, 504
 14. If the notice sent to the drawer of a bill arrives too late through

misdirection, it is for the jury to say whether the holder used due diligence to find the drawer's address. *Siggers v. Brown*,

Page 520

15. When notice of dishonour reaches the drawer of a bill too late, having first by mistake been sent to a wrong person, and such mistake arose from the indistinctness of the drawer's writing on the bill, he is not discharged. *Hewitt v. Thompson*, 543

BILL OF LADING.

A bill of lading is not conclusive between the shippers of the goods and the owners of the ship: but the owners may shew that less goods than specified in the bill of lading were shipped, the master, who signed the bill of lading, having been misled by the fraud of the agent of the shippers. *Bates and another v. Todd*, 106

BOND.

See STAMP, 3. 6. FRAUD AND COVIN.

Payment of a bond is not to be presumed after more than twenty years, if the money was lent to enable the obligor to go abroad, where he died shortly after, and there is evidence that his administrator never received any assets. *Elliott and another v. Elliott*, 44

BOUGHT AND SOLD NOTES.

1. In an action by the vendee against the vendor, on a contract made through a broker, it is sufficient for the vendee to produce the bought note handed to him by the

broker, and to show the employment of the latter by the vendor. If the sold note vary from the bought note, it lies on the vendor to prove that variance by producing the sold note. *Hawes and another v. Forster*, Page 368

2. When a contract is made through a broker, the bought and sold note delivered to the parties constitute the contract, not the entry made by the broker in his book; especially when, by the usage of trade, the bought and sold notes are looked upon as the contract. *Ib.* 368

BOUNDARY OF PARISHES.

Where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them. *Rex v. The Inhabitants of Landulph*, 393

BRIBERY.

See ILLEGAL CONTRACT, 1, 2, 3.

BROKER.

See BOUGHT AND SOLD NOTES.

BURGLARY.

See HOUSEBREAKING.

A permanent building used and slept in, only for a short time, for the purpose of a fair, may be treated as the dwelling-house of the person so occupying it in an indictment for burglary, though unoccupied the rest of the year. *Rex v. Smith*, 256

CARRIER.

See **VARIANCE**, 2.

1. A stage coachman is responsible for the loss of a parcel which he receives to carry without reward, if it is lost through gross negligence on his part. *Beauchamp v. Powley*, Page 38
2. When goods are forwarded for sale on approval, the consignor is the party to sue the carriers for the loss of the goods. *Swain v. Shepherd*, 223

CHANCELLOR, LORD.

See **TRESPASS**, 1.

COACHMAN.

See **CARRIER**, 1.

COALS.

A person generally employed to buy coals on commission for a retail coal merchant, but who sometimes, before the receipt of such orders, bought coals, and then let his employer have what he pleased of them, paying him at the same rate as when he had ordered them before-hand, is not to be considered, even with respect to the latter coals, as the vendor of them, so as to be liable to the coalmeter for the inspection fee under 47 G. 3. c. 68. s.95. *Bigg v. Megarey*, 35

COGNOVIT.

When a promissory note purports to be payable on demand, but was in truth given to secure the repayment of money by instalments; the payee having already brought an action on the note, and taken a *cognovit* for the instalments then due, cannot maintain a second action for default in payment of sub-

sequent instalments. *Siddall v. Rawcliff*, Page 261

COMMISSIONER TO TAKE AFFIDAVITS.

An affidavit, purporting to be sworn before a public commissioner, is admissible without proof of the commission. *Rex v. Howard*, 187

COMPOSITION.

See **DEBTOR AND CREDITOR**.

CONSPIRACY.

See **ASSOCIATION. INDICTMENT**, 1.6.

A combination of workmen for the purpose of dictating to masters what workmen they shall employ, is indictable. *Rex v. Bickerdyke*, 179

CONTRACT.

See **BOUGHT AND SOLD NOTES**.

1. Where work is undertaken on contract at a given price, the employer is not liable to any greater amount by consenting to alterations from the original plan, unless he is expressly informed, or must necessarily, from the nature of the work, be aware, that the alterations will increase the expense. *Lovelock v. King*, 60
2. When a tradesman finishes work, differing from the specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price, minus such a sum as it would take to complete the work according to the specification. *Thornton v. Place*, 218

COPYRIGHT.

See **AUTHOR**.

COUNSEL.

See INDICTMENT, 2. PRACTICE, 9, 10, 11, 12.

COURTS OF REQUEST.

Persons seeking their livelihood in *Westminster* are not privileged under 23 G. 2. c. 27. from being sued elsewhere than in the *Westminster* Court of Requests for a debt under 40s. Such privilege is only given to inhabitants and residents. *Scotts v. Seager*,
Page 244

CRIM. CON.

See EVIDENCE, 18.

CUTTING AND MAIMING.

See INDICTMENT, 9.

DATE.

See EVIDENCE, 15.

DEBT.

Quære, Whether, in an action of debt, the defendant pleading payment, and not appearing to support his plea, the plaintiff is bound to prove the amount of his debt? *Macintosh v. Weiller*, 505

DEBTOR AND CREDITOR.

When a creditor compounds with his debtor under a false impression, in which the debtor knowingly leaves him, as to the extent of the debtor's estate, the creditor is not estopped from suing for the balance of his debt. *Vine and another v. Mitchell*, 337

DECEIT.

A person misrepresenting the credit of another, though without any intention of defrauding the party

to whom he makes the representation, is liable to make good damage occasioned by that party's giving credit in consequence to the subject of the representation; but only to the whole extent of the loss in consequence of credit *reasonably* given on the representation. *Corbett and another v. Brown*, Page 108

DECLARATIONS.

See BILLS OF EXCHANGE, 5. EVIDENCE, 3. 6, 7, 8, 9. 21, 22. HUSBAND AND WIFE, 2.

DEPOSITIONS.

See EVIDENCE, 14. 20.

DESCENT.

See ESCHEAT.

DETERMINATION OF SUIT.

The acceptance of the debt and costs in satisfaction of the action, under a Judge's order or a rule of reference, is a sufficient determination of a suit. *Combe v. Capron*, 398

DEVISE.

The stat. 25 G. 2. c. 6. makes void a devise to an attesting witness, although there be three other attesting witnesses to the will. *Doe d. Taylor v. Mills*, 288

DISORDERLY HOUSE.

Where music is usually provided in a room in a public-house for the purpose of attracting customers, the landlord is liable to the penalties of 25 G. 2. c. 36., though

nothing is paid by the customers for the music. *Greggory v. Tuffs*,
Page 313

DISTRESS.

See LANDLORD AND TENANT, 1. 4.
FRAUDULENT REMOVAL. PRINCIPAL AND AGENT, 1.

1. A tenant tendering his rent after distress taken, but before it is impounded or removed, may maintain trespass for a subsequent removal of the distress. *Vertue v. Beasley* and others, 21
2. The constable who swears the appraisers of a distress under the statute 2 W. & M. sess. 1. c. 5. s. 1. must attend with the appraisers at the time of the appraisement, and must swear them before they make it. *Kenney v. May* and another, 56
3. Trover is not maintainable for goods merely seized as a distress excessive in quantity. *Whitworth v. Smith*, 193
4. An auctioneer receiving, for the purpose of sale, goods so seized, who returns them to the party who sent them, is not answerable in trover, although while the goods were with him he had notice that the distress was illegal, and refused to deliver them to the owner. *Ib.*
5. An appraisement by one sworn broker is sufficient in distresses for rent under 20*l.* *Fletcher v. Saunders*, 375

DWELLING HOUSE.

See BURGLARY.

DYING DECLARATIONS.

See EVIDENCE, 22.

EJECTMENT.

See PRACTICE, 1. 4. 22. 26.

ENCLOSURE ACT.

See HIGHWAYS, 3.

ENTRIES.

See EVIDENCE, 3. 8.

ESCAPE.

The sheriff is not liable for an escape on *mesne* process for the whole debt, if the plaintiff's remedy remains against a solvent party, but only for so much as his remedy is affected by the delay and escape, and his costs. *Scott v. Henley*,
Page 227

ESCHEAT.

When land descends to the son of an illegitimate father, who is proved to have been the purchaser, and the son dies seised, intestate, and without issue, such land does not devolve upon his heirs *ex parte maternad*, but escheats to the crown, notwithstanding the stat. 3 & 4 W. 4. c. 106. s. 2. *Doe d. Blackburn v. Blackburn*, 547

ESTIMATE.

See CONTRACT.

ESTOPPEL.

See LANDLORD AND TENANT,
7. SHERIFF, 1.

EVIDENCE.

See ATTORNEY, 1, 2. BILLS OF EXCHANGE, 5. EXAMINATION. HANDWRITING. HUSBAND AND WIFE, 1, 2. INSANITY. INSOLVENT DEBTORS, 2. PETITIONING CREDITOR. PRIVILEGED COMMUNICATION. WITNESS.

1. In trover for a written document, the plaintiff may prove the nature

- and description of the document by secondary evidence, though the defendant offers to produce it. A party has a right to call for and have read, a letter making a demand on the other party for the purpose of proving the demand, though the counsel for the other party offers to admit the demand. The statement of facts in such letter is not evidence of the facts, but only of their having been communicated to the other side. *Whitehead v. Scott*, Page 2
2. Where one of the defendants in a cause informed a third person of the partnership of the defendants, reports of such information by that person are admissible in evidence, though not made to the plaintiff, or in the presence of a defendant. *Shott and another v. Strealfield and Green*, 8
 3. The entries of a person still living, against his interest, are not evidence against other parties; though it be shewn he is abroad, having absconded from a criminal charge, and altogether out of the power of a party to produce him as a witness. *Stephen v. Gwenap*, 120
 4. In an action against the vendor of an estate, to recover the deposit on a contract for the purchase, if the defendant on notice produce the contract, the plaintiff need not prove its execution. *Bradshaw v. Bennett*, 143
 5. A witness on cross-examination may admit not having mentioned a fact on a former examination, though that examination is in writing and not produced. *Ridley and others v. Gyde*, 197
 6. The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Harwood v. Keys and others*, Page 204
 7. The declarations of a trader made shortly after an absence are not admissible to prove such absence an act of bankruptcy. *Lees, Assignee, &c. v. Marton*, 210
 8. A deceased carpenter's bill with his receipts thereon is not evidence of the work having been done for the person charged, though the paper is found amongst the other papers of the person charged. *Doe d. Gallop v. Vowles*, 261
 9. On an issue to try the legitimacy of a party born of a married woman, since dead, declarations by her that he was not the son of her husband, but of another man are not admissible, nor are the declarations of the husband admissible. *Cope v. Cope*, 269
 10. A baptismal register, in which the party is described as the illegitimate son of his mother, is admissible evidence on the trial of such an issue. *Ib.*
 11. Where the husband has had opportunity of access to his wife at a period which admits of his having then begotten the child of her, he is presumed to have done so. But that presumption may be rebutted by strong circumstances to shew that the husband did not have sexual intercourse with his wife. *Ib.*
 12. Secondary evidence of a document, to produce which notice has been given, is not admissible where the document is held by a stakeholder between the party in the cause and a third person. *Parry v. May and another*, 279
 13. The balance sheet of a bankrupt given on oath under his commis-

- sion, is not admissible against him on a criminal charge. *Rex v. Daniel Britton*, Page 297
14. Evidence is admissible to add to the examination of a party before a magistrate though taken in writing. *Venafræ v. Johnson*, 316
15. Indorsements on a promissory note admitting the receipt of interest, are presumed to have been written at the time they bear date. *Smith and others v. Battens*, 341
16. The registry of a marriage is evidence between strangers of the time of a marriage. *Doe d. Wollaston and others v. Barnes*, 386
17. An attorney and steward of a lord of a borough is bound to produce under a *subpœna duces tecum* public documents relating to the borough; but he is not bound to produce documents relating to the lord's interest in the borough. *Rex v. Woodley*, 390
18. In an action for crim. con. evidence may be given in reduction of the damages that the wife had, before the criminal intercourse, complained of her husband's treatment of her. *Winter v. Wroot*, 404
19. The probate of a will is not admissible to prove declarations of the testator as reputation in a question of pedigree. *Doe d. Wild v. Ormerod*, 466
20. In an issue from Chancery, between *A.* and *B.*, depositions produced in Chancery by *B.* in a suit of *C. v. B.* are inadmissible. *Atkins v. Humphreys*, 523
21. The declarations of a testator are admissible, where a will is disputed on account of fraud, circumvention, or forgery. *Doe d. Ellis v. Hardy*, 525
22. Dying declarations in favour of the party charged with the death are admissible in evidence. *Rex v. Scaife*, Page 551
23. On a plea of usury to an action on a bond, a verdict of acquittal in an action for the usury penalties on the same bond, between the same parties, is admissible for the plaintiff. *Cleve v. Powell*, 228

EXAMINATION OF PRISONER.

An examination of a prisoner taken before a magistrate signed with the prisoner's name, may be given in evidence on the prisoner's handwriting being proved, by any one present at the time of such examination.

Where the prisoner has merely put his mark, it must be proved that the examination was correctly read over to him. *Rex v. Chappell*, 395

EXECUTION (IMMEDIATE).

See PRACTICE, 35, 36, 37, 38, 39, 40.

FACTOR.

1. A party receiving *East India* warrants from a factor as a pledge for money advanced to him cannot retain them under 6 G. 4. c. 94. against the true owner, if from the circumstances he must, as a reasonable man, have known them not to belong to the factor; although no direct communication of that fact is made to him. *Evans and another v. Trueman and another*, 10
2. A wharfinger, who is also a flour factor, having flour sent to him to keep for further orders, is not an agent intrusted with the flour within

the 6 G. 4. c. 94. s. 4. so as to give validity to a sale by him of the flour. *Monk v. Whittenbury*,
Page 81

FALSE IMPRISONMENT.

See **MAGISTRATE. TRESPASS. 1.**

FORCIBLE ENTRY.

A wife may be guilty of a forcible entry on the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry in itself is lawful. *Rex on the Prosecution of Smyth v. Smyth* and others, 155

FRAUD.

See **PLEADING, 1.**

FRAUD AND COVIN.

On a plea that a bond was obtained by fraud and covin, evidence is not admissible to show that the defendant executed it with full knowledge of its contents, in consequence of previous fraud. *Mason v. Ditchbourne*, 460

FRAUDS, STATUTE OF.

See **VENDOR AND PURCHASER, 2.**

FRAUDULENT PREFERENCE.

A transfer made by a debtor under apprehension of arrest, is not fraudulent and void, as voluntary, under the Insolvent Debtors' Act, 7 G. 4. c. 57. s. 32. *Corbould v. Broadhurst*, 189

FRAUDULENT REMOVAL.

It is not necessary that a party seizing goods fraudulently removed (under stat. 11 G. 2. c. 19. s. 7.) should first call to his assistance an ordinary peace-officer; it is

sufficient if he be assisted by a person appointed a special constable for the occasion. *Cartwright v. Wm. Smith* and another, Page 284

GAME.

A party in pursuit of game at night, provided with a stick or bludgeon, is not armed with an offensive weapon; unless the jury find that he took it with intent to use it as such. *Rex v. Palmer*, 70

HANDWRITING.

A jury may judge of a disputed handwriting, by comparing it with other documents in evidence for other purposes, and admitted to be the handwriting of the party. *Solita v. Yarrow*, 133

HIGHWAYS.

1. The inhabitants of a parish are not bound to the repair of a way used by the public and repaired by the parish for more than twenty years, if there be no owner who could dedicate the way to the public, and the repairs by the parish can be shewn to have been begun and continued under a mistaken notion of the liability of the inhabitants to repair. *Rex v. The Inhabitants of Edmonton*, 24
2. The inhabitants are bound by such repairs, if made with full knowledge of the facts, and with the intention of taking upon themselves the public duty. *Ib.*
3. *Semle*, that roads set out under an enclosure act, do not by presumption of law belong to the adjoining owner. *Ib.*
4. Where a public way crosses the bed of a river which washes over it at every high tide, and leaves a

deposit of mud : *Semble*, the parish is not bound to make it good. *Rex v. The Inhabitants of Landulph*,
Page 393

HIGHWAY REPAIRS.

See WITNESS, 5. 10.

HIRER AND LENDER.

See NEGLIGENCE DRIVING.

The hirer of a carriage by the year, under a written agreement binding the carriage maker "to keep the same in perfect repair without any further charges whatever," is not liable for repairs made necessary by accident, and not by the wilful default of the hirer. *Reading v. Menham*,
234

HOUSEBREAKING.

An entry to a house through a hole in the roof left for the purpose of light, is not a sufficient breaking and entering to constitute house-breaking. *Rex v. Spriggs and another*,
357

HUSBAND AND WIFE.

See FORCIBLE ENTRY.

1. A woman who was married to a man, but whose marriage to him is void by reason of her having a former husband living, who had been supposed dead, may be examined against him to prove his declarations made while she lived with him as his wife. *Wells v. Fisher*,
99
2. The declaration of a married woman, during coverture, of the non-payment of money lent to her before, is admissible in evidence for the plaintiff in an action brought against her husband as her administrator. *Humphreys v. Boyce*,
140

3. The express promise by a husband to pay a debt incurred by his wife, for which he is not otherwise liable, is binding. *Harrison v. Hall*,
Page 185
4. The goods of a woman, married to and living with an insolvent as his wife, he having a former wife living, do not pass to his assignees (although such goods were in his possession), if she was ignorant of the former marriage. But if she has allowed him the control and management of her property after discovery of the former marriage, such property passes to the assignees. *Isabella Miller v. Demetz and others*,
479

ILLEGAL CONTRACT.

1. Money deposited with an agent and expended by him in illegal disbursements, cannot be recovered from him by the principal, if the principal was at the time aware of the illegal disbursements, or if he subsequently assented to them. *Bayntun v. Cattle*,
263
2. Payment by a candidate at an election for a member of Parliament of the expenses of taking up the freedom of his voters is illegal. *Ib.*
3. Whether it be illegal to pay the travelling expenses of voter, *quære. Ib.*
4. The proprietors of a newspaper cannot recover for the non-performance of a contract for the printing of such newspaper before filing the affidavit required by the stat. 35 G. 3. c. 78. s. 1. *Houstun v. Mills*,
325

INDEMNITY.

An express promise to indemnify a servant for doing an illegal act for

the purpose of asserting some right of the employer, is valid, if the servant did not know the act to be illegal. *Fletcher v. Harcott*, cited in *Creevey v. Bowman*, Page 497 n.

INDICTMENT.

See ASSOCIATION. MANSLAUGHTER. CONSPIRACY. GAME. ROBBERY. TRAVERSE. VARIANCE, 1.

1. An indictment for conspiracy, "to prevent the workmen of *F. G.* from continuing to work, &c." is supported by evidence of a conspiracy to prevent *any* workmen from continuing, &c. *Rex v. Bykerdike*, 179
2. Counsel are not allowed to argue at length at *Nisi Prius* the invalidity of an indictment for the purpose of inducing the Court not to try it. *Rex v. Abraham*, 7
3. *Semble*, that a count for robbery and for an assault with intent to rob ought not to be joined in the same indictment. If they are joined, the party must elect on which the case is to go to the jury. *Rex v. Gough* and others, 71
4. A prosecutor cannot maintain two indictments for misdemeanor for the same transaction; he must elect to proceed with one and abandon the other. *Rex v. Daniel Britton*, 297
5. In an indictment for receiving stolen goods, knowing them to have been stolen by a person named, the stealing by that person must be proved, or the receiver must be acquitted. *Rex v. Woolford* and another, 384
6. An indictment for a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained, is too general and bad in point of law. *Rex v. Richardson* and others, 402
7. Where a person grossly ignorant of medicine administers a dangerous remedy to one labouring under disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter. *Rex v. Joseph Webb*, Page 405
8. On a conviction of manslaughter on an indictment for murder, not concluding *contra formam statuti*, punishment may be inflicted under 9 G. 4. c. 31. s. 9. *Rex v. Lucy Berry*, 463
9. A wound incurred by the prosecutor in forcing part of his person, in self-defence, against a weapon with which the prisoner was attacking him, is not a wound inflicted by the prisoner, within the stat. 9 G. 4. c. 31. s. 11. *Rex v. Beckett*, 526
10. To constitute a wound, the external surface of the body must be divided. *Ib.*
11. Goods remain "in a stage, process, or progress of manufacture," within the meaning of 7 & 8 G. 4. c. 30. s. 3. though the texture be complete, if they be not yet brought into a condition fit for sale. *Rex v. Woodhead* and another, 549

INDORSEMENT.

See EVIDENCE, 15. PRACTICE, 2.

INFANT.

Where the issue is, whether goods sold to an infant were necessities, evidence is admissible to shew that the infant at the time of the sale was already supplied with a sufficient quantity of that description of goods. *Burkhardt v. Angerstein*, 458

INSANITY.

See BILL OF EXCHANGE, 13.

When a prisoner's defence is insanity, a medical man who has heard the trial may be asked whether the facts proved shew symptoms of insanity. *Rex v. Searle*, Page 75

INSOLVENT DEBTOR.

See FRAUDULENT PREFERENCE.
PERJURY. SHERIFF, 2.

1. A party who has given in a schedule on oath of all his debts and credits to the Insolvent Debtors' Court, cannot afterwards claim a debt not there stated. *Nicholls v. Downes*, 13
2. *Quære*, Whether copies of the proceedings in the Insolvent Debtors' Court are admissible under 7 G. 4. c. 57. s. 76., except for the insolvent and creditors. *Ib.*
3. The assignee of an insolvent debtor cannot recover in an action commenced by him as assignee before the assignment executed to him, though it is executed before the trial, but not before the declaration. *Lawrence v. Miller*, 97
4. *Semble*, the discharge of an insolvent under 7 G. 4. c. 57. applies only to the debts named in the schedule, and not to all the debts due to the creditors named. *Bishop v. Polhill and another*, 363

INSURANCE.

See VENDOR AND PURCHASER, 1.

1. A homeward policy on freight at and from *A.* attaches when the ship is at *A.*, in a condition to take in her homeward cargo. *Williamson v. Innes*, 88
2. On a policy on freight the ship

having actually earned full freight, though not that intended for her, the owners cannot recover for the delay and expense as a partial loss. *Brocklebank v. Sugrue*,

Page 102

3. Where by means within the reach of the master, a ship can be so treated as to retain the character of a ship, he cannot by selling her, even *bonâ fide*, convert the average into a total loss, but the underwriters are entitled to have those means used on their account. *Gardener and another v. Salvador*, 116
4. A party insured by one policy for 1,700*l.* on the ship *S.*, valued at 3,000*l.*, and by another for 2,000*l.* on the same ship, valued again at 3,000*l.*, cannot recover more than 3,000*l.* on the two policies. *Irving v. Richardson*, 153
5. Goods insured were described in the policy to be in the dwelling-house of the insured. The insured had only one room as a lodger, in which the goods were. Held, correctly described within a condition "that the houses and buildings or other places where goods are deposited and kept shall be truly and accurately described:" such condition relates to the construction of the house, but not to the interest of the party in it. *Friedlander v. The London Assurance Company*, 171
- 6 Where *A.* having no interest in the life of *B.*, induces him to cause a policy of insurance to be effected in his *B.*'s name, *A.* finding the funds for the premiums, and intending by assignment or otherwise to get the benefit of the policy himself, so that it is substantially the policy of *A.*, such policy is void, as a fraudulent evasion of the statute

- 14 G. 3. c. 48. ss. 1. and 2. *Wainwright v. Bland*, Page 481
7. Every man is presumed to have an interest in his own life and in every part of it, therefore an executor suing on a policy effected by his testator on two years of his life, is not bound to shew that such testator had any special reason for making such limited insurance. *Ib.*
8. Where a policy contains a proviso that it is to be deemed void if any thing set forth in a written statement, signed by the assured, should be found to be untrue, the insurers are discharged by the assured's misrepresenting a material fact, although such misrepresentation was made verbally, and did not form part of the written statement. *Ib.*
9. Where a policy of insurance contains a warranty that the insured "had not been afflicted with nor is subject to gout, vertigo, *fits*," &c., such warranty is not broken by the fact of the assured having had an epileptic fit in consequence of an accident. To vacate such policy it must be shewn that the constitution of the assured was naturally *liable* to fits, or by accident or otherwise had become so *liable*. *Chattock v. Shawe* and others, 498
10. A ship being wrecked was sold by the owner and master, and soon after got off by the owner and repaired, though at a great expense. The owner cannot treat this as a total loss, unless the sale at the time, in the exercise of a sound judgment, appeared most beneficial for *all* parties. If the ship is likely to be repairable, so as to come to *England* with any cargo, so as upon her arrival to be worth the sum laid out on her, it cannot be treated as a total loss,

though she cannot be made fit to carry the cargo originally intended for her.

Semble, that the law would be the same if she could only return *in ballast*. The loss of the cargo cannot make a constructive loss of the ship on a policy on the ship only. *Doyle v. Dallas*, Page 48

INVOICE.

See WARRANTY, 2.

ISSUE.

See PRACTICE, 7.

JOINT TENANTS AND TENANTS IN COMMON.

To a declaration in debt for arrears of rent, stating that the plaintiff and one *J. S.* deceased were seised in fee, and demised to the defendant from year to year, rendering rent to the plaintiff and *J. S.*, which had fallen into arrear since the death of *J. S.*, it is a good plea, on general demurrer, that the plaintiff and *J. S.* were tenants in common. *Burne v. Cambridge*, 539

JOINT TRESPASS.

See PRACTICE, 30, 31, 32.

LANDLORD AND TENANT.

See DISTRESS. PRINCIPAL AND AGENT, 1. FRAUDULENT REMOVAL.

1. In an action for rent, *semble*, that it is no answer that the landlord has distrained goods for it to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a price, the tenant's remedy is by action. *Efford v. Burgess*, 23

2. A tenant of a house who is bound by agreement to keep it in tenantable repair may quit without notice in the course of his term if the premises become unwholesome for the want of sufficient drainage, if they cannot be kept dry without extravagant and unreasonable labour and expense on his part. *Collins v. Barrow*, Page 112
3. A general covenant to repair is satisfied by the lessee keeping the premises in *substantial repair*; a literal performance of the covenant is not to be required. *Harris v. Jones*, 173
4. A tenant holding over after notice to quit given by the landlord, is not liable to a distress without some evidence of a renewal of the tenancy. *Jenner v. Clegg*, 213
5. Where a lessor covenants to keep old premises in repair he is not liable for such dilapidations as result from the natural operation of time and the elements. *Gutteridge v. Munyard*, 334
6. *Semble*, that an action on the case does not lie against a landlord for distraining for more than the actual arrears of rent, unless the distress taken be of larger value than will satisfy the actual arrears. *Wilkinson v. Terry*, 377
7. Where a person claiming title to lands obtains possession from a tenant, he is bound by the tenant's estoppel, and cannot in an ejectment set up a valid title against the landlord. *Doe d. Buller v. Mills*, 385

LEASE.

An instrument will operate as a lease or an agreement for a lease, according to the intention to be collected from the whole instrument. *Perring v. Brook*, 510

LEGITIMACY.

See BASTARD.

LIBEL AND SLANDER.

See VARIANCE, 3.

1. Where a person originates false reports prejudicial to a tradesman, and being called on by the employers of the tradesman to examine the matters complained of, repeats to them the false statements, such statements are not privileged communications. *Smith v. Matthews*, Page 151
2. A letter written by a private individual to a public officer, complaining of the misconduct of a person under him, is not privileged from disclosure as an official communication. But if made *bond fide* and without malice, such communication is not actionable as libellous, though some of the charges may not be true. *Blake v. Pilfold*, 198
3. In an action for libel, previous libels of the plaintiff shewn to be the provocation of that charged, are admissible in mitigation of damages. *Watts v. Frazer* and another, 449
4. In slander where the words proved are unambiguous, subsequent words of the same import are inadmissible. *Pearse v. Ornsby*, 455
5. Charges made by a rate-payer against the constable of a district, to a meeting of rate-payers met to investigate the constable's disposal of the money of the inhabitants, are privileged, and may be made by letter, if the rate-payer be prevented from attending. The party alleging such letter to be libellous must at all events prove the absence of the rate-payer to have been wilful. *Spencer v. Amerton*, 470

6. In slander where the words proved are unambiguous, evidence of subsequent words of the same import is inadmissible. Previous slander for which damages have been recovered may be given in evidence. *Symmons v. Blake*, Page 477

LIEN.

See TROVER, 2.

LIGHT AND AIR (RIGHT TO).

The user of a space of ground in a particular way requiring light and air for 20 years, does not give the right to preclude the adjoining occupier from building on his land so as to obstruct the light and air. *Roberts v. Macord*, 230

LIMITATIONS, STATUTE OF.

1. A promise in writing to pay the balance due is enough under statute 9 G. 4. c. 14. to take a case out of the statute of limitations, although the writing does not express the amount of the balance. But if the whole evidence be proof of the writing and of the original cause of action, the plaintiff can only recover nominal damages. *Dickinson v. Hatfield*, 141
2. An entry in a bankrupt's examination of a certain sum being due, to A. is evidence of an account stated between them and is a sufficient acknowledgment to take the case out of the statute of limitations. *Eicke gent. one, &c. v. Nokes*, 359

LUNACY.

See INSANITY. BILLS OF EXCHANGE, 13.

VOL. I.

MAGISTRATE.

A magistrate has no right to detain a man to answer a charge of misdemeanor verbally intimated to him but without a regular information. *Rex on the Prosecution of Smith v. Birnie*, Page 160

MALICIOUS ARREST.

Where in case for a malicious arrest the declaration alleges certain facts "whereupon and whereby the suit was ended and determined" the plaintiff cannot shew any other determination of the suit than the mode stated. *Combe v. Capron*, 398

MALICIOUS INJURY TO GOODS.

See INDICTMENT, 11.

MANSLAUGHTER.

On an indictment for manslaughter, it is not necessary to allege the causes, merely natural, which conduced to the death of the party, it is sufficient to allege truly the act with which the prisoner is charged, if that act accelerated the death. *Rex v. Joseph Webb*, 405

MANUFACTURE.

See INDICTMENT, 11.

MARRIAGE REGISTRY.

See EVIDENCE, 16.

MASTER AND SERVANT.

See NEGLIGENT DRIVING. INDEMNITY.

MEMORANDA.

See PAGES, 225. 358.

Q Q

MONEY HAD AND RECEIVED.

1. *Assumpsit* for money had and received lies to recover money paid by the Plaintiff under a *forgetfulness* of facts which were within his knowledge. *Lucas* and another v. *Worswick*, Page 293
2. When an overseer has stopped part of a pauper's parochial weekly allowance and engaged to pay it over to the landlord of the pauper in pursuance of an understanding between the three; held, that the landord could not support *assumpsit* for money had and received against the overseer. *Blackledge v. Harman*, 344

MONEY PAID.

See **ILLEGAL CONTRACT**, 1.

MUSICAL ENTERTAINMENTS.

See **DISORDERLY HOUSE**.

NEGLIGENT DRIVING.

In an action for damages done through negligent driving of a carriage and horses let to hire and driven by the servants of the owner, it is a question for the jury whether the servants were acting as the servants of the person hiring or of the owner. *Brady and Ux v. Giles*, 494

NEWSPAPER.

See **ILLEGAL CONTRACT**, 4.

NEW TRIAL.

See **PRACTICE**, 34.

Where the jury have incorrectly, and contrary to the Judge's direc-

tions, found for the defendant, the court will not grant a new trial to enable the plaintiffs to recover nominal damages only. *Harris v. Jones*, Page 173

NISI PRIUS RECORD.

Where the *Nisi Prius* record has been altered, after it was passed, by one of the parties without an order from a judge, the Court will try the cause as it stands on the record, and will not amend it at *Nisi Prius* by striking out the alteration, or the part of the declaration in which the alteration was made. *Drummond v. Burt*, 136

NOTICE TO PRODUCE.

See **ATTORNEY**, 2.

1. Where the attorney in a cause has been changed, a notice to produce served (before the change) on the first attorney is sufficient to call for production of the paper on the trial, without fresh service on the second attorney. *Doe d. Martin v. Martin*, 241
2. Notice to produce must be served before the commission day on parties living away from the assize town. *Trist v. Johnson*, 259
3. Notice to produce served on a prisoner during the assizes two days before the trial is insufficient to let in secondary evidence. *Rex v. Ellicombe*, 260

OFFICIAL ASSIGNEE.

See **WITNESS**, 12.

OVERSEER.

See **MONEY HAD AND RECEIVED**, 2.

PARISHIONER.

See WITNESS, 5. 10.

PARTICULARS.

A defendant who has not complied with a judge's order to deliver particulars of set-off *with dates*, will not be allowed to give any evidence of his set-off.

Particulars delivered, in which the only dates were "from *January* 1828 to *January* 1834," are not a compliance with such an order. *Swain and others v. Roberts*, Page 452

PARTNERS.

See EVIDENCE, 2.

Where two persons are in partnership, the presumption is that they are interested in the partnership stock in equal moieties. *Farrer v. Beswick*, 527

PATENT.

See WITNESS, 13.

PAYMENT.

See BILLS OF EXCHANGE, 8.
BANKERS.

PAYMENTS, APPROPRIATION OF.

A party to whom two sums are due — the one for spirituous liquors supplied in quantities not amounting to twenty shillings at a time, the other for board and lodging — may apply payments made generally, to the account for spirituous liquors. *Cruickshanks v. Rose*, 100

PAYMENT, PRESUMPTION OF.

See BOND.

PAYMENT OF MONEY INTO COURT.

Where money is paid into court, in an action of *indeb. assumpsit* for work and labour, and the work was all done under one contract, the defendant is estopped from saying that he contracted with the plaintiff and another party who ought to have been a co-plaintiff. *Walker v. Rawson*, Page 250

PARISH.

See BOUNDARY.

PERJURY.

See COMMISSIONER.

An indictment for perjury will not lie under the 71st section of 7 G. 4. c. 57. against an insolvent debtor for omissions of property in his schedule; such offence being made liable to certain punishment, under the 70th section, as a substantive misdemeanor. *Rex v. Mudie*, 128

PETITIONING CREDITOR.

See EVIDENCE, 6.

Where a new petitioning creditor's debt has been substituted, under the statute of 6 G. 4. c. 16. s. 18., it is sufficient to prove the petition to the Chancellor for the substitution of the debt; the Chancellor's order referring the sufficiency of the debt, &c. to the commissioner; and the finding of the commissioner thereon. It is not necessary to produce the Chancellor's order confirming such finding. *Batchelor and another v. Vyse, Esq.* 331

PLEADING.

Q Q 2

See **BILLS OF EXCHANGE**, 13. **TRESPASS**, 2. **MALICIOUS ARREST**, **VARIANCE**.

1. When the plaintiff, in trover, claims under a sale, the defendant under a plea that the goods are not the plaintiff's property, cannot shew the sale to have been fraudulent, the fraud must be pleaded. *Howell v. White*, Page 400
2. In an action on an attorney's bill, non-delivery of the bill must be pleaded, or the plaintiff need not prove the delivery. *Moore v. Dent*, 462
3. The plea of not guilty to an action on the case for a deceitful warranty of soundness, puts in issue both the warranty and the unsoundness. *Spencer v. Dawson*. 552

PLEDGE.

See **FACTOR**, 1.

POSSESSION.

See **LIGHT AND AIR**.

POWER.

By deed between coparceners, and their husbands to lead the uses of a fine in order to effect a partition, —the share of one coparcener was limited (after life estates to the parents) "to the use of the child or children," (without words of inheritance) "for ever, subject nevertheless to such divisions, directions, orders, and appointments as the husband by will or deed should think fit to direct, or appoint." Held, that these words gave the husband not merely a power of distribution, but a general power to appoint the fee simple, and that such power was well

executed by indentures of lease and release expressed to be made in consideration of money paid, as well as of natural affection. *Doe d. Chadwick v. Jackson*. Page 553

PRACTICE.

(AMENDMENT.)

1. It is too late to amend the record by increasing the term in ejectment after the cause has been called on. *Doe d. Manning v. Hay*, 243
2. An indorsement on a bill of exchange, not stated in the declaration, may be struck out after the bill has been read in evidence and after an objection has been made on account of the variance. *Mayer v. Jadis*, 247
3. Amendments under the stat. 3 & 4 W. 4. c. 42. s. 23., will not be refused on the ground of the harshness of the action. *Doe d. Marriott v. Edwards*, 319
4. In ejectment on a joint demise by two, the plaintiff was not allowed to amend under statute 3 & 4 W. 4. c. 42. s. 23., by substituting several demises. *Doe d. Poole v. Errington*, 343
5. Superfluous averments and inuendos in libel ought not to be struck out at the instance of the plaintiff at *Nisi Prius*. *Prudhomme v. Fraser*, 435
6. In case for fraudulent misrepresentation, an amendment of the misrepresentation charged may be made at *Nisi Prius*. *Mash v. Densham*, 442
7. Where a record is taken down for trial without any issue having been joined by the addition of the *similiter*, the defect may be cured by adding the *similiter* at the trial. If the jury have been sworn before the defect is found

out, they should be resworn after the *similiter* has been added. *Dyson v. Warris* and another,

Page 474

8. An amendment of a declaration will not be allowed under 3 & 4 W. 4. c. 42. s. 23. if it appears probable that the variance may have prevented the defendant from pleading a good bar to the action. *Ivey v. Young.* 545

COUNSEL. (See INDICTMENT 2.)

9. A party appearing in person must examine the witnesses as well as address the jury. Counsel can only be heard to assist him on legal objections. *Shuttleworth v. Nickolson,* 254
10. When a party conducts his own case and examines his own witnesses, counsel are not allowed to argue points of law for him. *Moscatti v. Lawson,* 454
11. Only one counsel can be allowed to address the jury for several defendants relying on the same defence. *Mason v. Ditchbourne,* 462
12. In opening the case for the prosecution in felony, counsel ought to state declarations proposed to be proved as well as facts. *Rex v. Orrell,* 467

(RIGHT TO BEGIN.)

13. In trespass with plea of *liberum tenementum* and no general issue, the defendant is entitled to begin. *Pearson v. Coles,* 206
14. Upon a plea in abatement of the nonjoinder of other parties, the plaintiff is entitled to begin unless the damages are admitted. *Morris v. Lotan,* 233
15. In an action for a libel when there is no general issue, but a justification is pleaded as to part, and judgment is suffered by default as

to the residue, the plaintiff is entitled to begin. *Wood v. Pringle,* Page 278

16. The plaintiff is entitled to begin in all cases where damages of an unascertained amount are the object of the action, though the affirmative of the issues on the record be with the defendant. *Carter v. Jones,* 281
17. Where a defendant in replevin pleads property in a third person, and issue is taken thereon, he is entitled to begin. *Colstone v. Hiscolbs,* 301
18. When real damages are not the object of the action, the party on whom the affirmative issue lies, is entitled to begin. *Burrell v. Nicholson,* 304
19. In ejectment by lessors claiming under several descents from a particular ancestor, where the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin. *Doe d. Wollaston v. Barnes,* 386
20. In covenant, the party on whom the affirmative of the issue lies, is entitled to begin, though the damages are unascertained. *Reeve v. Underhill* and others, 440
21. In *assumpsit* for unworkmanlike execution of a contract; plea, that the work was properly done, the plaintiff is entitled to begin. *Amos v. Hughes,* 464
22. Where the plaintiff in ejectment claims as heir-at-law, and the defendant as devisee; if the heirship be admitted the defendant is entitled to begin, although the plaintiff professes to set up an outstanding term as to part of the property. *Doe d. Smith v. Smart,* 476
23. In replevin any issue in which the affirmative is on the plaintiff,

gives him the right to begin. *James v. Saller* and another, Page 501

24. In covenant where the affirmative is on the defendant, he is entitled to begin, though the damages are unascertained. *Wootton v. Barton*, 518

25. In cases where any affirmative proof lies on the plaintiff, to shew what damages he is entitled to, he has a right to begin *Absalom v. Beaumont*, 441. n.

(RIGHT TO REPLY.)

26. In ejectment by heir-at-law, against devisee, the defendant is not entitled to the reply unless he admits the plaintiff's whole case. *Doe d. Pills v. Wilson*, 323

27. When a defendant relies upon a legal objection and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply. *Arden v. Tucker*, 192

(SPECIAL JURY.)

28. Where the plaintiff or prosecutor, has obtained, and struck, a special jury, and has withdrawn the record, the defendant may take down the record by proviso, and claim a trial by a common jury. *Rex v. Derbyshire*, 307

(TRIAL.)

29. The court will not put off a trial at the instance of the plaintiff beyond the present sittings on account of the smallness of the claim, and the alleged poverty of the plaintiff. *Fendal v. Marriat*, 1

30. In an action of trespass against several, the plaintiff having proved

a joint trespass committed by all the defendants, cannot waive that, and give evidence of another trespass committed by only one defendant. *Tait v. Harris* and two others, Page 282

31. Where the plaintiff offers no evidence against one of several defendants, such defendant is entitled to be acquitted at the close of the plaintiff's case. *Child v. Chamberlain* and others, 318

32. One defendant in trespass against whom a *prima facie* case has been made by the plaintiff, is not entitled to have his case put separately to the jury, in order to his being acquitted, and becoming a witness for the other defendant, however clear the exculpatory evidence on his part may be. *Leach v. Wilkinson* and others, 537

33. Where a declaration contains several counts, founded on the same transaction, the plaintiff cannot at the close of his case be called upon to state on which count he relies. *Swinburn v. Jones*, 322

(NEW TRIAL.)

34. *Quære*, Whether a new trial can be obtained on the ground that a party has been improperly deprived of his right to begin. *Burrell v. Nicholson*, 305

EXECUTION (IMMEDIATE).

35. The court will not certify under stat. 1 W. 4. c. 7. s. 2. that execution ought to issue immediately in an action of debt on simple contract. *Fisher v. Davies*, 93

36. Affidavits are not admissible in support of an application for immediate execution under the

- 1 *W.4.c. 7. s. 2.* That statute only, applies to cases where, on the facts at the trial, the judge thinks there ought to be immediate execution. *Gervas v. Burtchley*, 150
37. The court will not certify under stat. 1. *W. 4.c. 7. s. 2.*, that execution ought to issue immediately in an action of debt on simple contract. *Percival v. Alcock*,
Page 167
38. In an action of *assumpsit* for a common debt the Court will certify for immediate execution though the verdict be taken by consent and the consent does not contain any such terms. *Anon.*
167
39. The statute 1 *W. 4. c. 7. s. 2.* is not limited to cases of contract but applies to all actions where the judge thinks there ought to be immediate execution. *Barden v. Cox*,
203
40. The plaintiff is entitled to early execution under 1 *W. 4. c. 7. s. 2.* in actions of debt as well as other forms of action. *Young v. Crooks*,
220

PRESCRIPTION.

A plea of twenty years user of a right of way, under 2 & 3 *W. 4. c. 71.* is not defeated by proof of an agreed alteration of the line of way, nor by a temporary non-user under an agreement of the parties. *Payne v. Shedden*,
382

PRINCIPAL AND AGENT.

See FACTOR.

1. A landlord distraining is *prima facie* liable for the acts of his bailiff in taking goods privileged from distress, though they never come to his hands; but if, when he knows the circumstances, he disclaims

and repudiates the act, he is not bound by it. *Hurry v. Rickman* and another,
Page 126

2. An agent employed to sell an estate has not, as such, authority to receive payment. *Mynn v. Jolliffe*,
326

PRISONER.

See EXAMINATION.

PRIVILEGED COMMUNICATION.

See ATTORNEY, 1. LIBEL, 1, 2, 5.

1. Communications made to an attorney respecting a matter in dispute and controversy are privileged, though no cause was then commenced. *Clark the younger v. Clark the elder*,
3
2. Communications made to an attorney by his client respecting the sale of estates are privileged. The privilege is not extended to suits existing or expected. *Mynn v. Jolliffe*,
326
3. Where two parties in dispute have one attorney, a communication by one to him in his common capacity is not privileged, but may be used by the other. *Baugh v. Craddock*,
182
4. Communications made by an attorney acting as such between two parties are not privileged from disclosure against either party. *Cleve v. Powell*,
228

PROBATE.

See EVIDENCE, 19.

PROVISO (TRIAL BY).

See PRACTICE, 28.

PUBLIC DOCUMENTS.

See EVIDENCE, 17.

QUACK DOCTORS.

See INDICTMENT, 7.

RAPE.

The 9 G. 4. c. 31. s. 18. does not make emission unnecessary to complete the offence of a rape. *Rex v. Russell*, 122

RECEIVING STOLEN GOODS.

See INDICTMENT, 5.

REGISTRY (MARRIAGE).

See EVIDENCE, 16.

REGISTRY (OF BAPTISM).

See EVIDENCE, 10.

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See PRACTICE, 17. 23.

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RETURN.

See SHERIFF, 1.

ROBBERY.

Obtaining money from a wife under threat of accusing her husband of an unnatural offence, is not robbery. *Rex v. Edward*, 255

SET-OFF.

See PARTICULARS.

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See INDICTMENT, 3. PRACTICE, 33.

SEVERAL DEFENDANTS.

See PRACTICE, 30. 31. 32.

SHERIFF.

See ESCAPE. TROVER, 3.

1. In an action for an escape, the sheriff is bound by the statement in his return, not only as to the fact of the arrest, but also as to the day on which it was made. *Cook v. Round, Esq.* Page 512
2. A sheriff who executes a *fi. fa.* after notice that the defendant has obtained his discharge, under the Insolvent Debtors' Act, 7 G. 4. c. 57. is not a trespasser. *Whitworth v. Clifton, Esq.* 531

SHIP.

The owner of a ship is not liable for money advanced to the master, and expended by him in the necessary use of the ship, unless the money is advanced *expressly for that purpose*. *Thacker and others v. Moates*, 79

SIMILITER.

See PRACTICE, 7.

SLANDER.

See LIBEL.

SPECIFICATION.

See CONTRACT, 1, 2.

STAMP.

1. An administrator who has been compelled to pay an annuity for which his intestate was liable, may recover on a plea of *ne unques administrator* against a party who had covenanted to indemnify the intestate against such payment, though such claim of indemnity has not been taken into account on the letters of administration. *Carr v. Roberts*, 45

2. An unstamped agreement is admissible in evidence between the parties to it, for the purpose of proving usury. *Nash v. Duncombe* and another, Page 104
3. A bond conditioned for the payment of 1000*l.* and interest on a day certain, requires only a 5*l.* stamp. *Dixon v. Robinson*, 115
4. Where an agreement and a writing described therein as annexed to it, contain together more than 1050 words, a 35*s.* stamp is required, although, in fact, the writing was annexed to the agreement after it was executed. *Veal v. Nicholls*, 248
5. A receipt indorsed on the back of a stamped deed may be separately read in evidence, though it be part of an indorsement requiring another stamp. *Ody v. Cookney*, 517
6. Where a bond is conditioned for the payment of money which is declared to be the same money as that secured to be paid by an indenture of even date, it must, to dispense with an *ad valorem* stamp, appear by recital or production of the indenture, that the latter was such an indenture as required an *ad valorem* stamp. *Walmsley v. Brierley*, 529

STATUTES.

- 3 *Jac.* 1. c. 7. § 1. (Attorney's Bill), 33. 85
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See PRACTICE, 5.

TENANTS IN COMMON.

See JOINT-TENANTS.

TORTFEASORS.

See INDEMNITY.

TRAVERSE.

A party acquitted of a felony, for which he has been held to bail, or committed more than twenty days, is entitled to traverse, on an indictment being preferred against him for the same transaction as a misdemeanor. *Rex v. Williams*, Page 503

TRESPASS.

See SHERIFF, 2.

1. The Lord Chancellor is not liable to an action in respect of an order of commitment made by him in bankruptcy, even admitting such order to have been irregular. *Dicas v. Right Hon. Baron Brougham and Vaux*, 309
2. Where a person, applying to be employed in a public office, deposits with the head of the office a certificate of previous good character by way of testimonial, and on his leaving the office such document is returned to him by the head of the office in a mutilated state, the head of the office is not, *primâ facie*, responsible for the mutilation: and supposing the head of the office to be the person who mutilated the document, the remedy against him is by action on the case, not by trespass. *Taylor v. Rowan*, 490

TRIAL (PUTTING OFF).

See PRACTICE, 29.

TROVER.

See DISTRESS, 3. 4. EVIDENCE, 1.

1. Where the drawer of a bill of exchange deposits it with a creditor,

giving him authority to apply the proceeds in a specified way; if the creditor, after an act of bankruptcy by such drawer, allows the bill to be renewed, and gives up the original bill to the acceptor, this is a conversion by the creditor, and the assignees of the drawer may support trover. *Robson v. Rolls*, Page 239

2. If a person having a lien on goods wrongfully parts with them, the owner's right to the possession revives, and he may maintain trover for them. *Scott v. Newington*, 252
3. Trover does not lie against the sheriff to recover the value of goods sold in excess beyond what was necessary to satisfy the execution. *Batchelor and another v. Vyse, Esq.* 331

UNION.

See ASSOCIATION.

**UNNATURAL OFFENCE
(ACCUSING OF)**

See ROBBERY.

USES.

See POWER.

USURY.

See EVIDENCE, 23. STAMP, 2.

VARIANCE.

See MALICIOUS ARREST. INDICTMENT. 5.

1. In an indictment, alleging a dwelling-house to be "situate at the parish aforesaid," the parish last mentioned must be intended. *Rex v. Richards*, 177
2. An averment of a contract to

carry goods from *London* to *Bath*, is supported by evidence of a contract to carry from *Westminster* to *Bath*: *London* must be taken in the enlarged and popular, not limited sense. *Beckford v. Crutwell*, Page 187

3. An allegation of slanderous words, accompanied by an assertion of a fact as a foundation of the words, is not supported by evidence of the words, accompanied with the assertion of the speaker's belief only of the fact. *Cook v. Stokes and Wife*, 237

4. Allegation that premises were situate in the parish of *A.* and *B.*; proof, that part of the premises was situate in the parish of *A.*, and the residue in the parish of *B.*: Held, a fatal variance. *Doe d. Marriott. v. Edwards*, 319

VENDOR AND PURCHASER,

See WARRANTY.

1. A sale by auction of a policy of assurance on the life of a third person, cannot be invalidated on the ground of fraud because the particulars of sale did not mention that vendor had only the redeemable interest in the life of the party insured, although that interest is afterwards redeemed, if the practice of the office is to pay such policies without inquiring into the continuance of the interest, and if there is no misrepresentation or improper concealment of facts by the vendor: evidence of the course of the office as to payment in such cases, is receivable. *Barber v. Morris*, 62
2. A party to whom goods to the amount of 10*l.* and upwards are delivered, subject to approval,

under a parol order, must refuse to accept them in a reasonable time: if he does not, he is to be treated as having accepted them. *Coleman v. Gibson*, Page 168

3. Where it is provided by the conditions of sale by auction that "if any mistake be made in the description of the premises or, any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made," the vendee is not released from his contract by reason of a misdescription in the particulars of sale, obvious on inspection of the premises, unless such misdescription was wilful and designed. *Wright v. Wilson*, 207

WARRANTY.

See PLEADING, 3. WITNESS, 2.

1. Mere badness of shape, though rendering the horse incapable of work, is not unsoundness. *Dickinson v. Follett*, 299
2. The description of a picture as being the work of a particular master, in an invoice, is not a warranty that the picture was painted by that master; it is a question for the jury under the facts of the sale whether a warranty was intended. *Power v. Barham*, 507

WAY, RIGHT OF.

See PRESCRIPTION.

WILFUL TRESPASS.

A party using unreasonable violence to beat off a dog which runs at him, is guilty of a wilful trespass under the statute 7 & 8 G. 4. c. 30. s. 24.; and if he is seen committing

the act, and a constable immediately sent for who follows him (he having quitted the place) and apprehends him at the distance of a mile, this is an "immediate apprehension" of a person "found committing" an offence under the 7 & 8 G. 4. c. 30. s. 28. *Hanway v. Boulbee and Us*, Page 15

WILL.

See EVIDENCE, 19. 21.

WITNESS.

1. It is not admissible to impeach a witness by showing he has made a particular statement, unless the witness denies having made such statement. It is not enough that he states he has no recollection of making such statement. *Pain v. Beeston and another*, 20
2. In an action on a warranty of a horse, the vendor of the horse to defendant, who gave a similar warranty on that sale, is a competent witness for the defendant. *Baldwin v. Dixon*, 59
3. In case for negligently driving against the plaintiff's horse, the plaintiff's servant, in whose charge the horse was, is incompetent for the plaintiff. *Sherman v. Barnes*, 69
4. If a witness objects to answer questions, on the ground that they may subject him to criminal proceedings, the counsel on the opposite side cannot argue in support of the witness's objection. *The King on the Prosecution of Fane v. Adey*, 94
5. Inhabitants rated, or liable to be rated, for the highways, are incompetent witnesses for the district indicted for the non-repairs of a highway. *Rex v. The Inhabitants of Bishop Auckland*, Page 286
6. The first vendor of a horse war-

- anted sound, is not competent to prove soundness for his vendee in an action brought against him on a subsequent sale with warranty. *Biss v. Mountain*, Page 302
7. A witness liable to indemnify the defendant, is not a competent witness for him, notwithstanding statute 3 and 4 W. 4. c. 42. s. 26. *Burgess v. Cuthill*, 315
 8. A person liable by bond for the costs of the action, may be rendered competent by depositing the penalty of the bond, as security for the costs, with the officer of the court. *Lees and another v. Smith*, 329
 9. A witness attending, at the request of a party, an arbitrator, under a submission to be made a rule of court, is privileged from arrest. *Rishton v. Nisbett*, 347
 10. In an action against an overseer, defending on behalf of the parish, an inhabitant is not rendered competent for the overseer by the statute 54 G. 3. c. 170. *Tothill v. Hooper*, 392
 11. When a witness gives evidence destructive of the case which he was called to prove, the party calling him may in order to neutralise his evidence shew that he had before the trial given to the attorney an account of the transaction entirely different from that sworn to by him at the trial. *Per Lord Denman C. J., dissentiente Bolland B. Wright v. Beckett*, 414
 12. In trover by a bankrupt against his assignee, his official assignee is a competent witness for the defendant to sustain the bankruptcy. *Giles v. Smith*, 443
 13. In case for the infringement of a patent, a purchaser of a licence to use the patent is a competent witness for the plaintiff. *Derosne v. Fairlie*, 457

14. A witness who may be liable to the costs of the action as special damages may be made competent by indorsement on the record pursuant to statute 3 & 4 *W. 4. c. 42. s. 26, 27. Pickles v. Hollings* and another, Page 468

15. A witness interested in the result of a suit in equity, is not made competent on an issue directed in such suit by 3 & 4 *W. 4. c. 42. s. 26, 27. Stewart v. Barnes,* 472

On an issue to try the validity of a *modus* within a certain district an occupier of lands within such district is incompetent to prove such *modus,* *Ib.*

16. The person under whom the defendant justifies in trespass, may be rendered a competent witness

for the defendant by indorsement on the record under statute 3 & 4 *W. 4. c. 42. Creevey v. Bowman,* Page 496

WITNESS (ATTESTING.)

A deed attested by a witness, now blind, may be read on proof of the witness's writing without calling him. *Pidler v. Paige,* 257

WORK AND LABOUR.

See CONTRACT.

WOUND.

See INDICTMENT, 10.

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